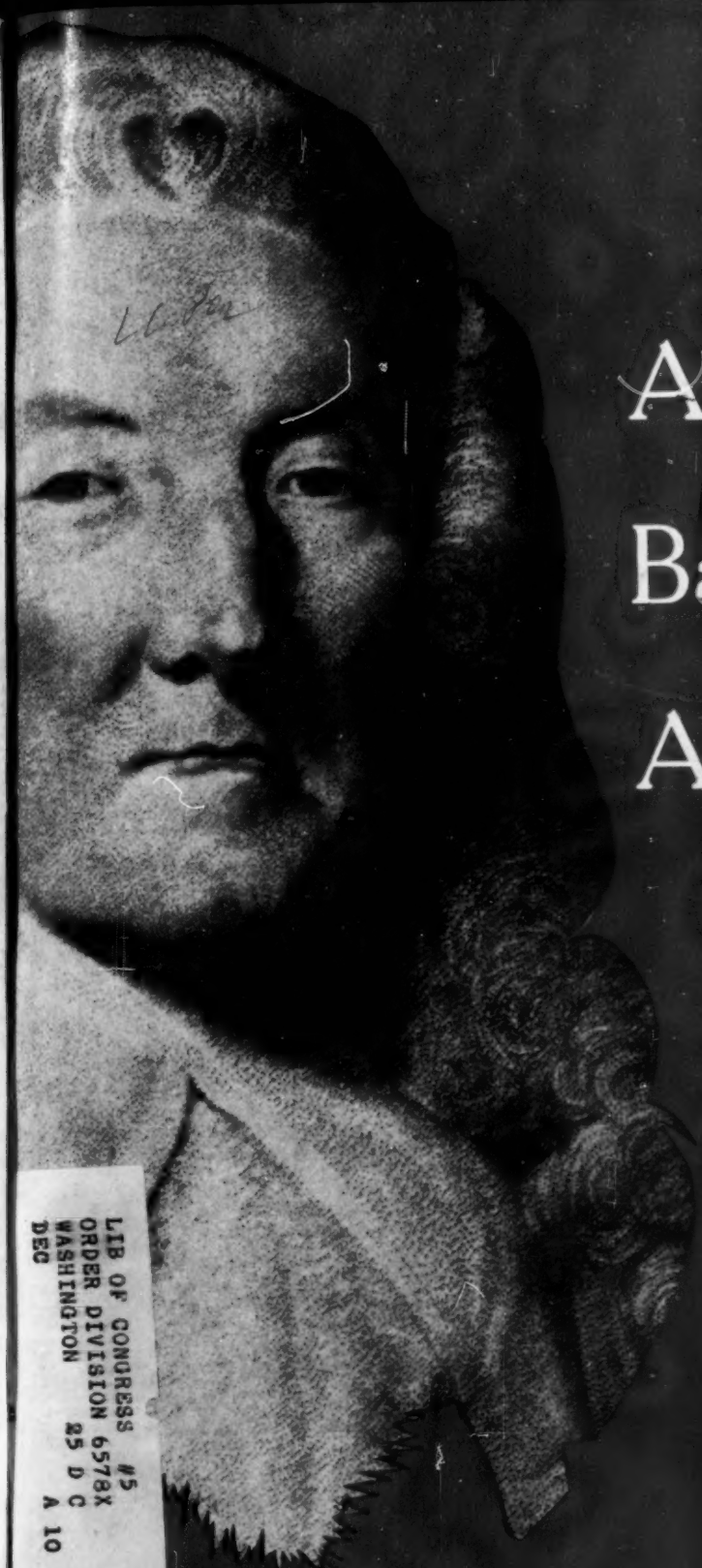

American Bar Association Journal

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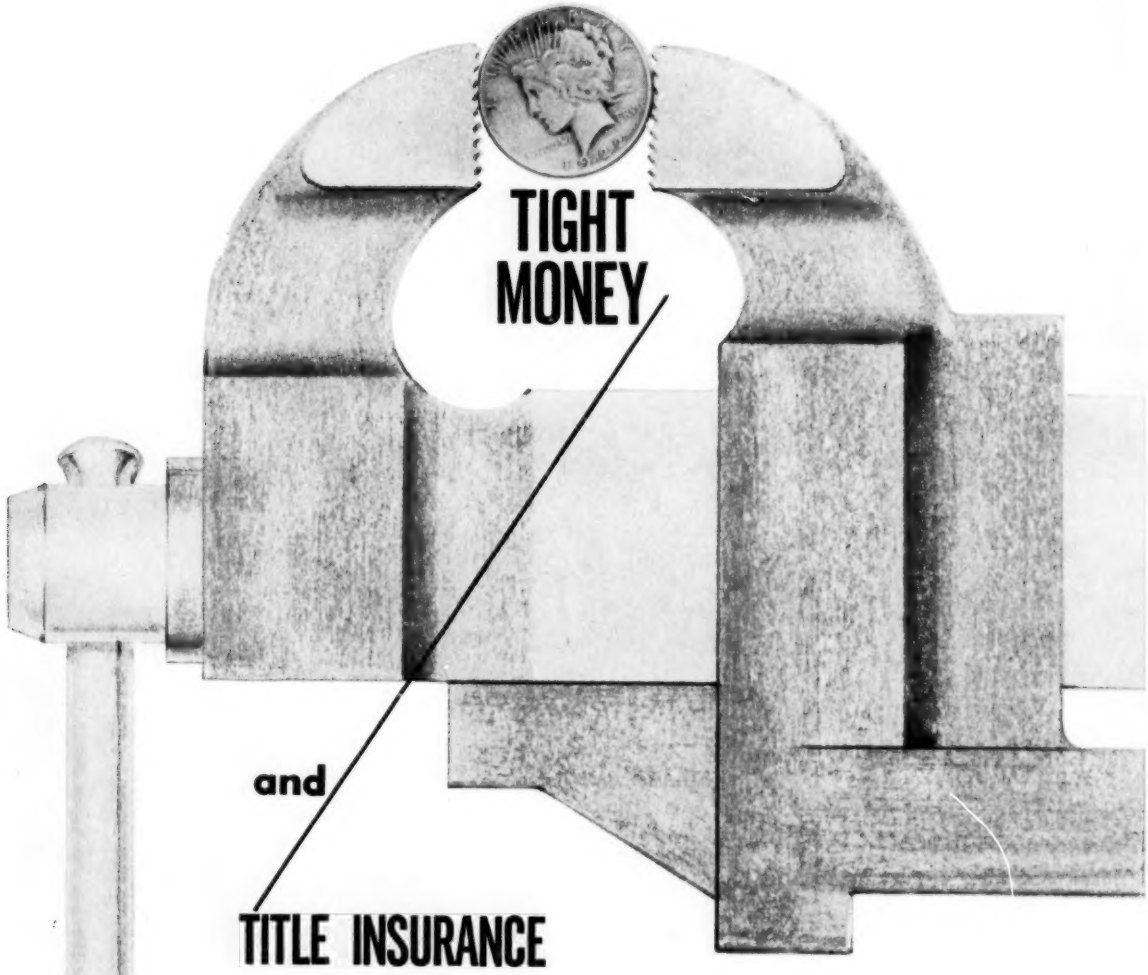

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This Month's Cover

On our cover this month are the features of Lord Chief Justice Mansfield, one of the great English judges, whose influence on commercial law in England and America is unsurpassed. Born on March 2, 1705, he was called to the Bar at Lincoln's Inn in 1730. He became one of the most successful practitioners, first in Scotland, then in England, was made Solicitor General in 1742 and Attorney General in 1754. He became Chief Justice of the King's Bench in 1756. He died March 20, 1793.

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The President's Page

David F. Maxwell

▪ Although this year your Association has been emphasizing a program of "Service for Lawyers", we cannot allow any suggestion of laxity in the recognition of the obligation of the Bar to serve the public to go unchallenged, especially when our motives as lawyers are called into question.

An article appearing in a recent issue of a national magazine suggests that our Association is lukewarm in its support of the institution of legal aid because, so the article says, legal aid is against the monetary interest of lawyers. Further the author intimates that we of the Association countenance a system of legal charges so extortionate as to bankrupt people of moderate means who seek our services to defend them against accusations of crime.

The nub of the author's indictment of the legal profession appears in the following excerpt from his article:

> As usual the ordinary citizen has been overlooked. No provision has been made to ease his plight and none seems to be on the horizon.

The author neglected to mention the Lawyer Referral Program which has been in effect for more than twenty years and is today operating in more than 100 cities. Nor did he note that the Association at the present time is collaborating with the National Legal Aid Association to broaden the scope of the legal aid program so as to include the defense of the indigent charged with crimes.

Although the author mildly praises the Public Defender organization operating in twelve states, he ignores the Voluntary Defender Plan by which the bar associations of many other areas provide counsel in criminal cases for indigent persons.

So the charges aired in the magazine article not only greatly distort and misrepresent the manner in which the Bar is fulfilling its responsibility to the public in this respect, but also the attitude which the Bar now takes and has always taken toward the problem of fees. The distortion is not clarified by the failure of the article to refer to well-known and widely publicized income statistics indicating that the average lawyer today earns, before taxes, about the same yearly income as a good bricklayer. It seems it suited the purpose of the author of the article better to suggest that all lawyers had mysterious means of becoming wealthy.

Without imputing improper motives to the author of the article, we were inclined to attribute his failure to mention the various types of services made available to the public by the organized Bar to a lack of knowledge on his part of their existence. If he was unaware of the availability of such facilities, then a large segment of the public must likewise be ignorant. Greater publicity and more advertising of the existence of Legal Aid, Lawyer Referral and the Voluntary Defender Plan immediately occurred to us as the most logical solution. At this point we were suddenly confronted with a decision handed down February 6, 1957, by Claude Ogilvie, Judge of the Fourth Judicial Circuit Court of Duval County, Florida, in the case of *Wilson* v. *Jacksonville Bar Association and John M. Marees*, No. 94241-E. The order finds that an advertisement placed in newspapers in Jacksonville by the "Lawyers Reference Service" is in violation of Section 27 of the American Bar Association's Canons of Ethics and of Article XI of the Integration Rule of the State of Florida Bar.

Since the beginning of the Lawyer Reference program in 1938, the use of advertising to acquaint the public with its availability has been held to be proper by the American Bar Association's Committee on Professional Ethics and Grievances. In its opinion No. 227, issued in 1941, the Committee says in part:

"Canon 27 does not prohibit the employment of advertising facilities by an organized bar to acquaint the lay public with the desirability of securing legal services promptly when a legal problem arises, and to apprise the public of the maintenance of a Lawyers' Reference Service . . . and the availability of the service."

Obviously there is no point in having a lawyer referral service unless the public can be informed of its existence. Judge Ogilvie's ruling would deny to the Bar the right to advertise something the Bar is doing to serve the public. Fortunately, his ruling applies only to the Jacksonville service. No injunction was sought or granted. Nevertheless, it demonstrates the problem confronting the Bar in its efforts to correct the impression left in the public mind by such irresponsible magazine articles as that referred to above.

Views of Our Readers

▪ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications or excerpts therefrom which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.

Requests Loan of Darrow Material

▪ The centenary of Clarence Darrow, the most famous of American defense attorneys, will occur on April 18, 1957, but will be commemorated, in a day-long program, under the auspices of The Adult Education Council of Greater Chicago, on May 1, 1957.

In connection with this commemoration, I have been asked to assemble exhibits of various kinds that will serve to depict the man Darrow and his many-sided career, as lawyer, writer, civic leader, public official, civil libertarian, individualist, lecturer and teacher. I am eager to secure the loan of letters, briefs, manuscript and legal material in general, books, pamphlets, circulars and printed material generally, photographs, cartoons, drawings and other pictorial material—in short, anything that will revitalize Darrow, his personality and his career. I would like to obtain material on such famous cases as those involving Debs, MacNamara, Haywood, Moyer and Pettibone, Sweet, Scopes, Loeb and Leopold, Massie, *et al.* All of the material will be insured and otherwise protected while in our possession.

I am eager to correspond at once with all possessing or knowing of such material. My address is Suite 1351, 120 South LaSalle Street, Chicago 3.

ELMER GERTZ

Chicago, Illinois

A Note of Thanks for the Journal

▪ I wish to thank you sincerely for your kind thought of me in sending me the copies of the AMERICAN BAR ASSOCIATION JOURNAL each month. The October issue has just arrived and it reminded me of your generosity and a hearty thanks that I owe you which I have been neglecting for so long. I find them quite serviceable as reference and I thank you very much.

May I inform you in this connection that the Kinki Branch of Japan Bar Association was organized in February this year [1956] and it has just begun to undertake its activities. Kinki, by the way, is a central region in Japan embracing six prefectures: Osaka, Hyogo, Kyoto, Nara, Shiga and Wakayama.

Best wishes for your prosperity and success.

MASUO SHIMOIZAKA

Osaka Higher Court

He's No Idolater of Mr. Justice Holmes

▪ Having read the letter of Mr. Constable about Justice Holmes at page 969 of the October issue, I want to register emphatic concurrence therein.

Justice Holmes was a great gentleman and far above the average judge, with a pleasing style but neither a great nor a profound thinker and if he made any outstanding contribution to our jurisprudence, what was it?

Of course, great men are very rare and it is too bad more like Holmes do not grace the bench.

Many of his oft quoted phrases such as "men must turn square corners when they deal with the government" had no thought behind them. That idea might be appropriate where the government is master and the people subjects but where this is reversed and the people are master, why should a master turn square corners in dealing with servants?

Justice Holmes' connection with Harvard Law School and its faculty led its law review to continually stress his judicial infallibility and deprecate opposing opinions.

When he grew old and senile, Chief Justice Taft wrote his condition gave Brandeis two votes on the Court. Those who were clerks to the Justices at the time can verify that the Court once decided an admiralty case and assigned it for an opinion to Holmes. He remembered wrongly how it was decided, wrote the opinion the wrong way and each Justice to whom it was sent approved it. A few hours before it was to be delivered, a clerk caught the mistake.

JOHN E. HUGHES

Chicago, Illinois

The Meaning of the Fifth Amendment

▪ Having read, in the July issue of the JOURNAL, Dr. Richard C. Baker's article on the Fifth Amendment, entitled, "Self-Incrimination", I would like to make the following comments on it.

The subject in recent times has interested me greatly. I find myself provoked and made indignant with the way this Fifth Amendment is abused, not only by the public, but by some lawyers and judges on the Bench stretching its interpretation.

Dr. Baker's article, like so many written by others, on various subjects, is void of any definite and positive conclusions on the subject.

The amendment is worded and expressed so clearly, in simple Eng-

(Continued on page 200)

published monthly

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the official organ of the American Bar Association

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trademark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

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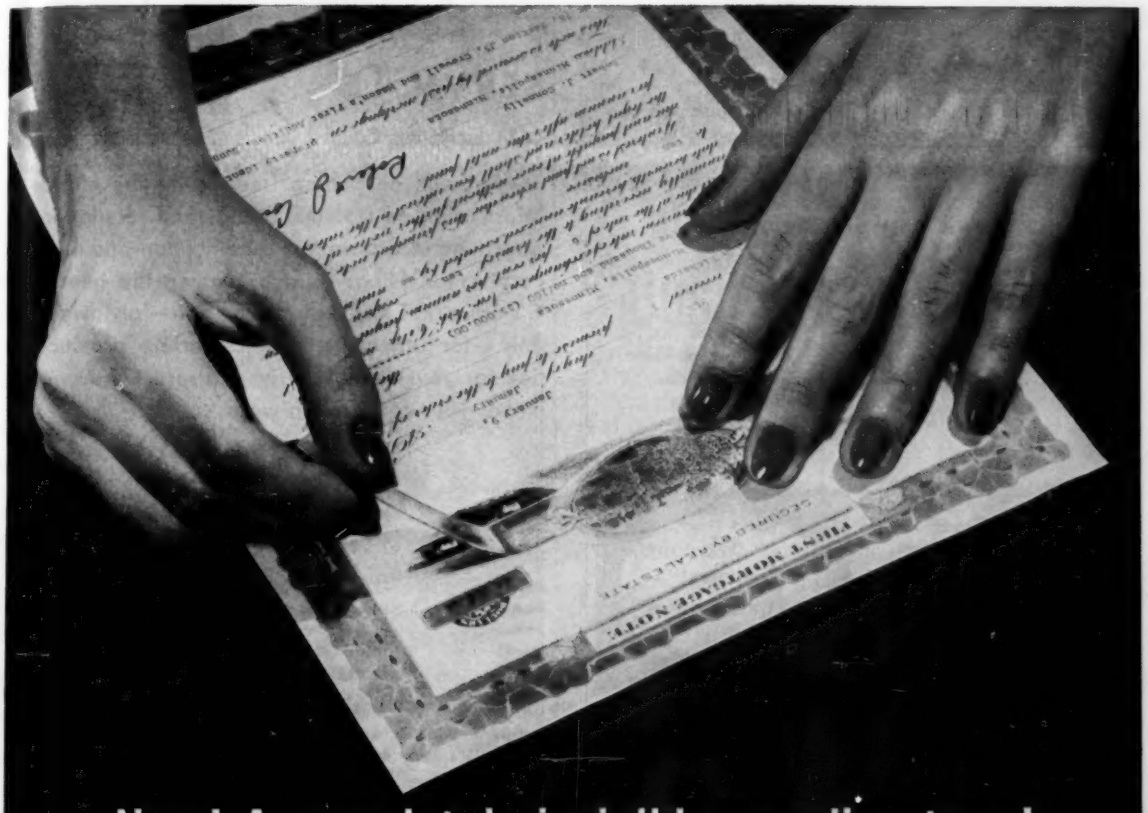

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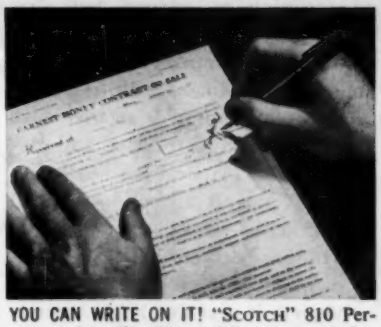

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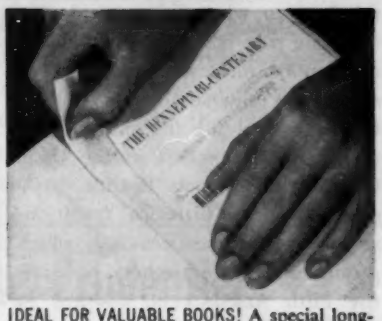

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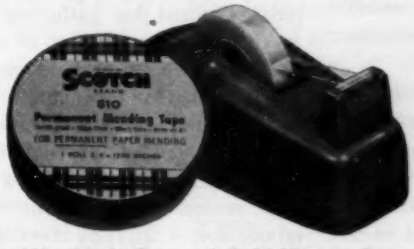

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(*Continued from page 196*)

lish, that I fail to understand why there should be doubt in anyone's mind as to what it means. It has only one true meaning. That meaning can be understood by any layman who understands the English language, and all the more so by anyone who is versed in the U. S. Constitution and its history, background and the historical traditions as well as the reasons which prompted our forefathers to draft the Fifth Amendment, adopted so soon after the U. S. Constitution was adopted.

The amendment has only one subject, with one meaning, namely: immunity to and for a defendant from incriminating himself in a criminal proceeding. Consider the words used in the Amendment: "No person shall be held to answer for a *Capital or other infamous crime* . . . presentment or indictment . . . nor shall be *compelled* in any *criminal case* to be a witness against himself—". Such words as "capital or other infamous crime"; "indictment"; "criminal case"; can convey no meaning to anyone but that which has to do with criminal offenses and criminal proceedings; and the Amendment with its words, intent and meaning is related only to *the person* thus indicted and giving him the privilege of *not* being a witness against himself—"where?" why in only *one* place, namely, in a criminal proceeding, and such takes place only in courts.

When is it that this Fifth Amendment is mostly invoked? It is in congressional investigations or those of certain committees or groups of people appointed for gathering information for the protection of our nation and its economy. No one, even by stretching his imagination to the breaking point, can read into this amendment anything about congressional or committee investigations. This amendment never contemplated nor does it apply to investigations or anything allied to an investigation. Let us in this connection recall Justice Benjamin Cardozo saying "Justice, however, could not perish if the accused were subject to the duty to respond to orderly inquiry". It covers, applies to, provides for, and contemplates only, *people* indicted for "a capital or infamous crime" and the defendant in a criminal case (prosecution), and this again contemplates a *person*, on proper accusation arrested, heard, indicted, and put on trial (by a court) before the Fifth Amendment can be invoked. It is during the legal hearing, then in the trial court proceeding, that the Amendment is invokable.

Yet, as against the brief, concise, clearly understandable English wording of the Fifth Amendment a host of laymen, lawyers and some judges, stretch the meaning of this constitutional provision beyond its clearly expressed intent, purpose and meaning, by giving it an interpretation never intended and putting it

(*Continued on page 202*)

(*Continued from page 200*)

to a use on occasions never proposed. Herein lies the abuse of a constitutional provision or privilege that may be considered and held as a sacred freedom for whom it was intended.

We never heard much about the Fifth Amendment and the habitual practice of invoking it, at congressional or committee hearings—for gathering information to and for our country's benefit, until the last few years, and until this country became the victim of Russian infiltration. Then certain "intellectuals", with pro-Russian natures, thoughts and ideas, conceived the use (misuse) of the Fifth Amendment for the purpose of defeating our governmental efforts. The insulting aspect of the performance is that so many who thus invoke this amendment are using our Constitution to shelter them in their activities which have in the end the purpose of undermining it.

I submit that it behooves the American Bar to correct thinking and proper action in the premises.

H. S. J. SICKEL

Philadelphia, Pennsylvania

Freedom of Speech —Even for Communists

■ In the October, 1956, issue, in the article "Free Speech and Internal Security", are the views of one of those lukewarm liberals who inevitably do the liberal ideal more harm than good. Judge Mathes has a sincere love of liberty and freedom of speech—as long as no one says anything *too* unpopular. He trumpets majestic words about the "new order of the ages", about the invasion of privacy (with gusto he condemns wire-tapping, which few think is quite respectable, anyway), about the Constitution—and then, in a phrase, cuts the heart out of the First Amendment.

Yes, says Judge Mathes, let us revere the right to say what one pleases, but let us distinguish "between freedom of expression to criticize the government and unlawful advocacy of forcible overthrow". Apparently he is for the First Amendment on the one hand, and the Smith Act on the other!

The "distinction" Judge Mathes makes is untenable if we *really* are interested in freedom of speech. John Stuart Mill said, in his essay *On Liberty,* that democracy can survive only by vigorous contention with the most odious and contrary doctrines, of which revolutionary Communism is certainly one. Does Judge Mathes consider our ideals too weak to endure on their own merits, our people too disillusioned to withstand the first Marxist demagogue allowed to have his say?

On the practical side, does Judge Mathes seriously believe there is any "clear and present danger" from a handful of Communists teaching and advocating, or conspiring to teach and advocate, our Government's violent overthrow? In the absence of sabotage—for which adequate laws exist—the presence of such a small

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and discredited element can hardly menace our security.

Let us, then, either support our liberties or oppose them. The McCarthys and McCarrans can at least be identified and fought. The real danger comes from pseudo-liberals frightened by outright fascism but willing to accept something less than true freedom, who would sell their birthright for a mess of warmed-over pottage.

LEWIS W. PETTERSON, JR.
Cambridge, Massachusetts

The Segregation Cases Can't Be Defended?

▪ The press carried the manifesto of "One Hundred Lawyers" criticizing the Bar for not defending the Supreme Court as they did in 1937, and here are my answers thereto:

While these manifestors concede that the Supreme Court is not *sacrosanct,* they deplore the present criticisms. It will be noted, however, that these manifestors did not pretend, even, that our *criticisms* were not well founded. Their legal self-respect would not permit that. I cannot see ex-Senator George Wharton Pepper giving his *imprimatur* to the various cases which have provoked our criticisms. It is difficult to see how any well-informed non-partisan or non-political lawyer could do that.

Again, they make no distinction between Roosevelt's attack on the Court in 1937 and the present criticisms. At that time, the Court was defending the Constitution; whereas, at this time, we are defending the Constitution against the Court's action. There is, therefore, a polar difference between the two situations, and that is why the lawyers are not acting as they did in 1937. *We* defend the Court, as an institution, but criticize the free-wheeling of its members. Because one prosecutes a reckless driver of an automobile is no reason to say that he is against automobiles. Nobody has indulged in more scathing attacks on some of the Court's actions than its own dissenting members, and this, the "One

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Hundred Lawyers" will have to confirm.[1]

The Bar owe it to themselves and to the public to endeavor to have a change made in palpably erroneous decisions (*Miles* v. *Illinois Central R. Co.*, 315 U.S. 698, 720, dissent for which they usually are very remiss), and this is generally done by a further appeal to the Court, which is what we are now doing in Maryland; but, from past actions of the Court, there may be little chance of presenting our case *vis-à-vis* the Court, *Lineman* v. *Waterfront Commission*, 347 U.S. 439, and *Re Application of Burwell*, 350 U.S. 521, something that is needed if there is to be much hope of making the Court correct its erroneous decisions.

The cold fact is that the Court in the *Segregation cases* acted as either a convention or a legislative body, overruled a long line of cases in one of which Chief Justice Taft wrote the opinion for a unanimous Court (in 1927, not 1895), and the Court, thereby, acting as an Ate, threw the Apple of Discord among our people, at a time when the war psychosis still prevailed.

We feel that in presenting our case, and in order to enlist the help necessary to get action, we can, without being accused of any wrongful public conduct, put the whole matter factually before the public, without destroying the Court. The Court is at fault, not its critics, if any harm is done to it. Maybe they will hereafter stick to their constitutional functions a little closer. We are still for the Court as an *institution*, and are still for its correction. We also would like to see how many of the one hundred would risk their reputations by supporting the *Segregation cases*. They simply cannot justify them.

GEORGE WASHINGTON WILLIAMS
Baltimore, Maryland

1. *Cf.* Justice Frankfurter, dissent *Winters* v. *New York*, 333 U. S. 507, 527, and Justice Roberts in *Smith* v. *Arkwright*, 321 U. S. 649, 668 *et seq.*, among numerous others; the Court in *U. S.* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 746, re necessity.

It Hasn't Given Any to Us!

■ The high interest rates about which folks are complaining only apply when money is *borrowed*. Our Federal Government is still *giving* it away as cheap as ever.

SEYMOUR J. WILNER
New York, New York

He Likes The Lawyer's Treasury

■ I have just finished reading *The Lawyer's Treasury* and want to commend you on this excellent volume.

While I liked all of it, I was particularly impressed with the following articles: "The Argument of an Appeal", by John W. Davis; "The County Seat Lawyer" by the late Justice Jackson; "Fountainhead of Law —the Facts" by Eugene C. Gerhart and the "Five Functions of the Lawyer" by Chief Justice Vanderbilt.

JOSEPH T. KARCHER
Sayreville, New Jersey

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The Doctrine of Waiver of the Self-Incrimination Privilege

▪ Since the appearance in the JOURNAL of June, 1954, of a rather amazing discussion [by Dean Erwin N. Griswold of the Harvard Law School] of the services rendered by the Fifth Amendment, several expressions in the way of the rebuttal of his thesis have followed. However, one of his misstatements has regrettably not been given its proper attention.

Referring to the possibility that a witness might inadvertently "waive" the protection of the privilege, Mr. Griswold asserted that "The threat of the waiver is not an imaginary matter. It may be found frequently in the transcripts of the proceedings of congressional committees."

Wishing if possible to verify this assertion, the writer checked carefully the record of proceedings in the Matusow affair, which started on February 21 and ran into May of last year. Of the 1,300 pages in this record, eight hundred were required to report the testimony of seventeen witnesses, no less than 465 of which were devoted to recording the testimony—and irrelevant speeches—of the principal in the "drama", Harvey Matusow.

When the "hero" invoked the privilege for the first time after 262 pages of testimony, the Chairman reminded him that he had already technically "waived" the privilege and demanded that he reply to the question. Even after the demand was more vigorously repeated, Matusow continued in his refusal to reply. Perhaps the Dean will be surprised that the Chairman at last "waived" his right to insist upon an answer—and that when finally excused many pages later, Matusow was not cited for contempt of Congress!

In the course of the 800 pages of testimony, a witness was told no more than ten times that he had waived his (or her) right to invoke the privilege because of earlier testimony—and surely, that can hardly

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The Future of Legal Education:

We Must Face the Realities of Modern Life

by **Arthur T. Vanderbilt** • *Chief Justice of the Supreme Court of New Jersey*

Few men in the United States are as well qualified as Chief Justice Vanderbilt to speak on the subject of legal education: in his long and distinguished career, he has been a practicing lawyer, dean of one of the country's leading law schools and chief justice of the supreme court of one of our more populous states. In this article, taken from an address delivered at the New York University Conference on the Future in Higher Education last fall, he examines critically our present system of preparing lawyers for their profession and sets forth the direction in which he thinks we must go.

The first task of a great law school is to produce great lawyers. Such part of the process as they cannot induce the schools, the colleges or the students themselves to do, they must perforce stand responsible for. Our task is not made easier by a basic fact of human nature that I have never seen amplified in discussions of legal education, but which we cannot escape in the law. While theoretically legal education is a lifelong process—and it is so in fact with the most devoted men—for a large portion going into the law, as in other professions, the educational process substantially ends with admission to the Bar. Out of professional loyalty I must decline to state my guess as to what the proportion is, but it is sufficiently large to drive us all to the conclusion that those things that we think all lawyers should know for the sake of the profession and the public we must make part of them before they leave college and law school. This is a human factor in legal education that must never be overlooked.

What are the functions of a great lawyer? First of all, he must be a wise counsellor to all manner of men in the various crises of their lives when they most need disinterested, competent legal advice. This calls for a thoroughgoing knowledge of the principles of the law and of the decisions, statutes and practices of his own state as well as broad and deep knowledge of human nature and of the principles governing modern society, including the ability to forecast the trends of society and of the law. Mr. Justice Holmes once said, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[1] This may not have seemed at all pretentious to Holmes, but to the practicing lawyer dealing with complicated situations it must often appear to be arrant effrontery to attempt to forecast the law. Yet he cannot escape it; it lies at the heart of the work of our profession.

Next, the great lawyer must be a skilled advocate, capable of representing his client in public and applying the law to the concrete facts in specific cases. Indeed, being a skilled advocate is a prerequisite to being a wise counsellor, for how can a counsellor decide whether or not a case should be tried or settled unless he can first interpret the facts in the light of the realities of the courtroom?

Most of the time of the law schools has necessarily been given up to preparation for some part of these two great functions. I say some part because everyone knows we do not cover either function adequately. To mention only the most obvious matters, it is notorious that many lawyers do not write well and that effective advocates are rarities at the Bar.

There are, however, other tasks of the great lawyer of equal importance with advocacy and counselling which we have only begun to recognize as functions of the lawyer.[2] The great lawyer must do his part personally and as a member of the organized Bar to improve his profession, the courts and the law. He must also be prepared to act as an intelligent and unselfish leader

1. *The Path of the Law*, 10 HARV. L. REV. 461 (1897).
2. Vanderbilt, *General Education and the Law*, 27 N. Y. U. L. REV. 39-41 (1952).

of public opinion within his sphere of influence. Finally, he must be prepared, not necessarily to seek public office, but to answer the call for public service when it comes. There is no sadder sight in the legal profession than that of a lawyer who has long dreamed of unselfish public service, but who has been so engrossed in serving private clients, that when the call comes to him for a public career he has so lost contact with the spirit and problems of the day that his efforts in the public interest prove abortive.

How far the Bar falls short of fulfilling its responsibilities in those fields every leader of the organized Bar and every law school dean knows full well. If it be objected that all this is imposing an intolerable burden on the law schools, we ask, human nature being as we suggested, where are lawyers to begin to get such training if not in law school? The problem becomes less forbidding when we sense the significance of the fact that all of this new training involves the same six basic elements that are always present in the work of the counsellor and the advocate: the assembling and marshalling of facts; the application thereto of the principles of law; dealing with human nature in a wide variety; giving consideration to the economic, political and social environment of each transaction coming up for consideration; reasoning back and forth with respect to all four of these types of material; and the use of understandable and convincing English, both oral and written.

Teaching Methods . . . *Professional Responsibility*

Every lawyer who attended the Conference on Education for Professional Responsibility, held at Buck Hill Falls in 1948 under the auspices of the Carnegie Corporation, could not but be aware that there were many areas in which business, engineering and medicine were conscious of their educational shortcomings and doing things to overcome them that the law had not yet undertaken. We still proudly relied on the case system as furnishing the most stimulating graduate teaching in the country. Imagine my dismay at reading a few years later in a report to the Survey of the Legal Profession this statement by Professor Lon Fuller of Harvard:

> Taking the Pennsylvania schools as a whole, good case-method instruction is a rarity. In this I do not think they are different from other law schools, including our most famous, for I am convinced that there is a decline in the use of the case system over the country as a whole.[3]

Professor Fuller is no pessimist or alarmist, but one of the ablest of law teachers. He has made some people unhappy,[4] but nobody has come forward to refute him. He was not writing about the use of casebooks in law schools, for all law schools use casebooks. He was concerned about *the case method*. Did not the case system as introduced by Langdell in 1870 and developed under him by Ames and Keener draw forth the truth from the student by the Socratic method of discussion instead of attempting to pour information into him by lectures or recitations from textbooks or casebooks?

The use of the case system as distinguished from the mere use of casebooks is the crowning glory of American law teaching and cannot be permitted to disappear, especially from those fundamental courses in substantive law where the rational is still contending in varying degree with the outmoded traditional law of an earlier day. Whether the professor and the student employ the broadsword or the rapier or the scalpel in their quest for truth, there can be no greater responsibility of our law school deans than a renaissance of the case system in all of its Socratic rigor, for inevitably the day will come when law schools will be rated first of all by the character of the case teaching in their fundamental courses. Parenthetically, I cannot but wonder how much modern concern with the minutiae of the *Restatement of the Law* has had to do with the decline of the effective use of the case method.

But even the most ardent advocates of the case system have long conceded that it is extravagant in its consumption of time, albeit the results obtained in teaching the important substantive courses of the first year (and I would add the courses in equity and trusts in the later years because of the different manner of thinking employed there) and the art of legal reasoning in those subjects fully justify its use of the case method. Even more controlling is the fact that a student's interest falls off markedly in the second and third years of the case system.[5] The teaching profession has been talking about this and writing about it since 1908[6] when Ballantine first proposed "books of concrete facts or skeleton cases raising important or crucial issues".[7] I have some notion as to how effective this problem method may be, because I recall the remarkable course in municipal corporations given years ago by Professor Thomas Reed Powell, where he tried the use of skeleton cases to supplement a none too satisfactory casebook. After disposing of the relatively few cases in the casebook in the traditional method, he would give us the essential facts of several cases and encourage us to debate them vigorously pro and con and reach our own conclusions as to

3. Fuller, *Legal Education and Admissions to the Bar in Pennsylvania*, 25 TEMPLE L. Q. 249, 263 (1952).

4. HARNO, LEGAL EDUCATION IN THE UNITED STATES (1953) 62-64 and authorities there cited.

5. Cavers, *In Advocacy of the Problem Method*, 43 COL. L. REV. 449, 453 (1943). There it is stated that ". . . after the first year, the system [case] is not exacting in its demands on any but the morbidly conscientious student. Its educational limitations are concealed by the achievements of the students trained by our improvised problem method and by the fact that most of our graduates do very well that which was also done very well by most of their office-trained predecessors."

6. Ballantine, Henry W., *Adapting the Case-Book to the Needs of Professional Training*, 2 AM. L. SCH. REV. 135, 137 (1908); Carusi, *A Criticism of the Case System*, 2 AM. L. SCH. REV. 213, 217 (1908).

7. *Op. cit.* 2 AM. L. SCH. REV. 135 at 137. See also Ballantine, HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, 162, 163 (1915). "Under the case method, as now applied, the student is swamped with case reading and has little time to think. He has to spend all his time keeping up with assigned cases. It is only in the final review that he does any constructive work, or brings together his law materials."

what the law should be on the premises stated. The excitement of the classroom drove us to the original reports and we came away with a compact body of knowledge as well as training that we failed to get in most other courses. Nor was the usefulness of the course at all impaired for me when I became a county counsel a few years later by Professor Powell's citation of many leading New Jersey cases.

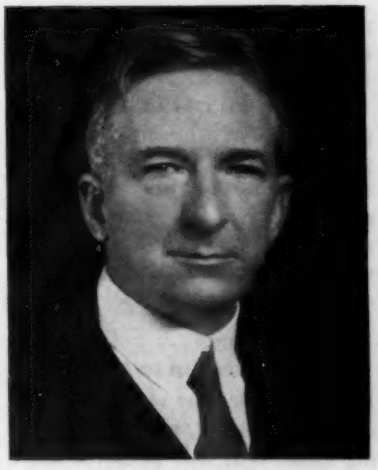
It is only by exploiting the problem method to the utmost in the second and third years of law school that I see any possibility of our being able to teach the law as a system along with the art of legal reasoning within the limits of the three-year law school course. This method is quite as rigorous and as Socratic as the case system and quite as adaptable to large classes.

Problem Courses . . . *Little Progress Over the Years*

This type of problem course, however, has made little progress in the law schools over the past half century, but meantime the schools of business administration under the leadership of the Harvard Business School have fashioned a highly successful instrument of education in a field quite as complicated as the law which seems to call forth from its students a degree of devotion and of exertion equal to the case system in its pristine splendor. I got my introduction to it at the Buck Hill Falls Conference where Professor Culliton spoke on the intriguing topic, "The Question That Has Not Been Asked Cannot Be Answered".[8] The interest it aroused in me led me to talks with a considerable number of students and they in turn introduced me to Glover and Hower's *Some Notes on the Use of the Administrator* (a manual for both teachers *and* students)[9] and McNair's *The Case Method at the Harvard Business School*,[10] works which I prayerfully commend to all law school deans, especially the last three chapters of the McNair book, where it will clearly appear that we have not spent the time, money or collective effort on the problem method in the law that it deserves. At the Harvard Business School they are not only teaching every subject in its entirety from specially prepared texts, but each course is carefully integrated with those related to it. The students are most anxious to cover each volume in its entirety because they know that otherwise they will experience difficulty with the next subject. I envy these young men their enthusiastic, inquiring minds. I hope that too many of them are not being drawn away from the law.

Partial Education . . . *Incomplete Courses*

As an appellate judge I am continuously impressed—or should I say depressed?—by the fact that lawyers from all the law schools seem to know so much less about the topics involved in the last third of each course than they do about the earlier parts of each subject, although in some subjects the last part of the course is the most important, *e.g.*, mergers and dissolutions in corporations. Is it too much to ask that the instructor plan his course so that he may cover the entire book? Concerning other subjects there is an almost complete dearth of knowledge. Apparently damages and restitution are no longer generally taught. We all realize that no law school course can cover all the law, but should not the fundamentals of



Arthur T. Vanderbilt

the common law be developed as a system and, even more important, the interrelations of its several parts revealed by cross-references from course to course?

There is no good reason at all to treat each course in the law school curriculum as an isolated, watertight compartment. Why cannot the gaps between the several courses be supplied and the overlappings be dispensed with for the sake of economy of time and the related doctrines of various courses be cross-referenced in the interest of integrated learning?[11] Perhaps the best way to cure these rather obvious defects of legal education would be by providing, as the English universities have long done, for examinations in particular subjects being set and

8. Education for Professional Responsibility (1948) 85-100.

9. A manual prepared for use in connection with Glover and Hower, The Administrator: Cases on Human Relations (1952).

10. Malcolm P. McNair, The Case Method at the Harvard Business School (1954) 291.

11. See Ballantine, Arthur A., *Presenting the Law: A Different Approach*, 5 J. Legal Ed. 345, 346 (1953), where the author states: "The deficiency that I find with the big law school is less its lack of the teaching of legal techniques (a lack which the school would probably scorn to make good) than its failing to give students a larger grasp of the law. I think that in my day the big school was so pleased with its distinctive method of instruction that it rather lost sight of what it was instructing in. It seemed the case of not seeing the wood for the trees.

"Recently I [Ballantine] secured a copy of the catalogue of the Harvard Law School, and I find that, reflecting the report of some years back by a highly competent committee of the faculty headed by Professor Lon Fuller, the course has been decidedly enriched. I still feel that there is a tendency to represent restricted vistas of branches of the subject (as in my day) rather than the larger view with incidental techniques. Enrichments seem to me to be optional rather than structural.

"I believe that the full-time law school might well bring the student to the profession by a different approach which would show him better what he has to deal with and how to proceed in the profession, and that the change would not involve having the law school become either a school of philosophy or a trade school."

See also Report of the Committee on Teaching and Examination Methods (Association of American Law Schools—1948 Handbook), 195: "Nearly all law teachers are faced by much more subject matter than can readily be covered in the available class hours if only the usual techniques of case teaching are used. There are several familiar ways of meeting this difficulty: the material that is thought less rewarding (or 'informational') may be omitted entirely; the teacher instead may cover it by lecture, proceeding much more rapidly than ordinary case instruction permits; or he may specify certain pages in the casebook (or in a hornbook or law review) to be read by his students, no class time being devoted to the subject matter thus covered. None of these methods is wholly satisfactory, but what are the alternatives? . . ."

graded by professors who do not give the course, and with one examination the country over.[12]

However this may be, it is only by pursuing after the first year the problem method as used in the business schools that we can hope to give the lawyer and, even more important the judge, the knowledge as well as the training he needs in his daily work.

A Great Change . . . *We Must Face Up to It*

A considerable part of the difficulty of the law schools, both as to teaching methods as well as to the scope of the curriculum, springs from the complete change in the environment and the content of the law over the last three-quarters of a century without our ever having faced up to the extent of the change in its entirety. Writing seventy years ago, Holmes might well say that the law schools had done their duty if they taught their students the principles of the common law and of equity, leaving it to them to acquire by themselves "the later developments".[13] But this view takes no account of the great statutory developments of modern times and it totally ignores the tremendous growth of administrative law, the outstanding legal development of the twentieth century. Even more important, it neglects the effect of the case by case operation of the law on these materials as well as the advances being made in the law by the courts alone to meet new conditions.

More and more we are being made aware of the gap between law in the books, with which Langdell and his followers worked almost exclusively, and the vastly different law in action that inevitably arises in a rapidly changing society such as that in which we are living. What our students need to know today is not merely the law in books; they are entitled to know the law in action. In many subjects this necessarily involves a relationship between the academic law professor and the practicing experts that today does not often exist, but the inevitable growth of which to meet the necessities of the times presages a new type of inns of court at their best, where the ablest judges, lawyers and law professors may rub elbows. I would promote this by subsidizing to whatever extent may be necessary the entrance every three and a half years of at least the youngest members of the law faculty into law offices, or government bureaus or perchance business so they may become actively familiar with the realities of the workaday world. I also think that each member of the faculty should teach at least one subject in public law as well as at least one subject in private law, if we are to avoid an eventual division of the faculty into two mutually exclusive groups and a consequent failure on their part to understand what is going on in the law as a whole.

It seems odd that in our constant comparison of the differences in the decisions in the common law from state to state we have never thought it worthwhile to compare in a broad general way the fundamental differences between the two greatest systems of law governing large parts of the world—the common law and the civil law. Mansfield, Kent and Story,[14] we know, enriched the com-

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12. Clive Parry in *The Cambridge Supervision System*, 7 J. LEGAL ED. 1, 10 (1954), points out that: ". . . . the English method of examining is very different from that prevailing in American Law Schools. The idea that each professor should always grade the papers in his own course, and should do so in isolation, is unknown. On the contrary, it is customary to appoint a board of examiners for each year's examination, whose members will set the papers severally and will later mark them severally, but who will meet to discuss the papers before they are printed and will meet again to determine the general grades to be awarded. The examining for the final year, and very frequently those for the earlier years, will contain representatives of other schools. These external examiners normally act exactly as their colleagues do, but in some schools only borderline cases are referred to them after preliminary grading by an internal examiner. One important result of the use of boards and of external examiners is that it very frequently happens that the paper will be set and the answers graded by someone other than the instructor giving the course. This is regarded as highly salutary; certainly it inhibits instructors from departing too far from the advertised program of the course. Equally, it is felt that the holding of examiners' meetings prevents the setting of questions which are unreasonably bizarre or the awarding of grades according to some individual and unreasonable system. The student commonly will not know who is to examine him in a given subject. And, since examining boards are not constituted too long in advance, often no one will know this until after the first half of the year has passed. The individual supervisor is thus precluded from directing his classes too specifically towards the examination. If he knows who will examine and who gives the course he can naturally, whether or not the same person is here involved, very often forecast the nature of the examination fairly accurately. But knowledge of these necessary bases for the 'spotting' of questions will very often be lacking."

13. "The professors of this law school mean to make their students know law. They think the most practical teaching is that which takes their students to the bottom of what they seek to know. They therefore mean to make them master the common law and equity as working systems, and think that when that is accomplished they will have no trouble with the improvements of the last half-century. I believe they are entirely right, not only in the end they aim at, but in the way they take to reach that end." *The Use of Law Schools*, an oration delivered November 5, 1886 on the occasion of the 250th anniversary of Harvard University. See SPEECHES BY OLIVER WENDELL HOLMES (1934) 38.

14. See POUND & PLUCKNETT, Ed., READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW (1927), 224-225 where it is set forth that: "He [Lord Mansfield] saw the noble field [absence of law concerning marine insurance, etc.] that lay before him, and he resolved to reap the rich harvest of glory. . . ." His improvements came by way of judicial decision. "His plan seems to have been to avail himself, as often as opportunity admitted, of his ample stores of knowledge, acquired from his study of the Roman civil law, and of the juridical writers produced in modern times, by France, Germany, Holland, and Italy—not only in doing justice to the parties litigating before him, but in settling with precision and upon sound principles a general rule; afterwards to be quested and recognized as governing all similar cases."

See also Kent, I SELECTED ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (An American Law Student of a Hundred Years Ago) 843 says: "I made much use of the Corpus Juris, and as the Judges (Livingston excepted) knew nothing of French or civil law I had immense advantage over them. I could generally put my Brethren to rout and carry my point by mysterious want of French and civil law. The Judges were republicans and very kindly disposed to everything that was French, and this enabled me without exciting any alarm or jealousy, to make free use of such authorities and thereby enrich our comercial law." And in II LIFE AND LETTERS OF JOSEPH STORY (Little & Brown, 1851) 96 quoting Story it says: " 'My [Story's] design in the present Commentaries [Commentaries on the Law of Bailments] has been, to present a systematical view of the whole of the common law in relation to Bailments, and to illustrate it by, and throughout compare it with, the Civil Law, and the modern jurisprudence of some of the principal nations of Continental Europe.' "

Dean Pound also indicates that: "Not the least of the means by which Story did so much to insure the general reception of English common law was a skillful use of comparative law, seeming to show the identity of an ideal form of the common-law rule with an ideal form of the civil-law rule, and thus demonstrating the identity of each with a universally acknowledged law of nature." THE FORMATIVE ERA OF AMERICAN LAW (1938), 107.

"The genius of the civilians was chiefly employed upon what may be called in a broad sense the law of contractual obligations; giving effect to the intention of the parties to legal transactions to create rights and duties; which has to do with the intention implicit in such transactions and the rights and duties annexed to the relations to which they give rise. The side of the law which called for immediate development in the formative era was the very side where civilians could help, and it was fortunate that there were a few strong judges (Story) and well trained, well read doctrinal writers who knew how to avail themselves of that help and make it available for the courts." *Id.* at 150-151.

Promoting the Public Welfare:

A Proposal for Establishing a People's Advocate

by **Abraham L. Freedman** · *of the Pennsylvania Bar (Philadelphia)*

The proposal which Mr. Freedman makes in this article is to establish a special legal office to represent the interests of the community as a whole in a variety of cases that have wide social import. As Mr. Freedman points out, legal cases supply a vehicle in which many great social questions can be brought into focus and perhaps decisively determined. The special legal office that he would set up would concern itself with such cases.

I.
The Proposal

My proposal is that there be established a law office, staffed on a high professional level equal to the best private law offices, charged with the responsibility of using all the weapons of the lawyer: conference, conciliation, persuasion and ultimately, litigation, in specific problems which have such a broad social effect that their successful consummation is clearly in the interest of the public welfare.

The specific problems in which the law office would become concerned would be chosen by an advisory board of trustees.

The chief counsel could, additionally, be associated with the law school of a university and thereby assist in the teaching and training of law students who could also serve as apprentices in the law office.

II.
The Nature and Effectiveness of Existing Private Activity

Reformers and civic-minded citizens and organizations have always, in varying degrees, been concerned with the improvement of the conditions of our society. The view of governmental responsibility has of course greatly expanded, and public activity is now accepted in areas which not long ago would have seemed incredible. There remains, however, a broad area which has not been occupied by government and which will remain substantially outside the domain of government.

But both in areas of governmental action and in those outside it, there continues to exist the need for private activity to preserve and promote the welfare of the public. In the first area, the need is for courageous resistance to the growing power of government against which the rights of the individual in specific cases often can be expressed only feebly. Their vindication in individual cases is a powerful check on the growth of tyranny, toward which power has such tendency to drive. In the second area, the need is to advance the welfare of the individual, at times even by increasing still further the responsibilities of government.

All this accounts of course for the activity of reformers, public-spirited citizens and civic groups. These individuals and groups, who volunteer their time and effort, act in the best of our traditions. They are entitled to the thanks of all those interested in the public welfare. It is no criticism of those who voluntarily contribute their effort in these fields, however, to conclude that they are less productive than one would hope.

The reason for this in part at least is that those who act as volunteers and the agencies which live on their work usually have neither the ability nor the means to proceed with long-term determination and energy and with the same persistent competence that one finds displayed in important private matters. It is customary enough to find high ideals, noble motives and often brilliant ideas brought forth. But much more rare is the determined crashing through to realistic, worldly success which is the hallmark of the profit-motivated private enterprise, where a successful result is the simple goal. There are some obvious explanations for this phenomenon, such as inadequate financial resources and public indifference. It is also a psychological characteristic

of those who have the need to act in such an area that they tend to lack the solid strength of those who adapt themselves to the realistic exercise of their talents in harmony with the mold of the society in which they live. It is for this reason that by and large an able young lawyer, however idealistic, will tend in our society to become the active servant of specific clients having specific problems whose virtue to him is that their problems are sufficiently realistic that they can afford to pay adequate fees for his services. This is not to fail to recognize that in increasing measure lawyers are aware of their social obligations and undertake to help and serve in problems where their skills are useful, without hope of financial reward. But this is the exception both as to individuals and as to the proportion of their time and energy which can with any justice be expected of them.

It is this characteristic which gives to the work of civic agencies generally the quality of fitfulness and which often robs them of effective accomplishment because of the apparent ease with which their most cherished aims can be brushed aside.

III.
A People's Advocate Would Fill an Important Need

A People's Advocate, which this proposal suggests, would be staffed on a level equal to the most able and respected law offices in its community. It would not be a volunteer organization, but rather a private law office serving civic causes or clients.

Why is a lawyer—or a law office—so important?

For two reasons:

(1) Because the machinery of the law, which only a lawyer can adequately invoke, provides in many cases an extraordinarily desirable forum for the advancement of progressive views on social welfare and at the very least, for popular education. It is a remarkable fact that legal proceedings supply a vehicle in which many great social questions can be focused and even at times decisively determined.

An excellent recent illustration of this is the United States Supreme Court decision in the *School Segregation cases*. There, within the framework of a lawsuit, one of the historic issues of our time has been determined. For many years it had been argued and discussed; views of the widest diversity had been bitterly urged. But such is the effect of our doctrine of supremacy of law that within the same channels of procedure as a simple accident case was decided the momentous issue of school segregation.

(2) The special skill, training and personal qualities of a successful lawyer combine to make him particularly effective. As a group the legal profession exercises enormous influence in our society. This is a fact which is evident and indisputable. Whatever may be the historical and other causes for this, it is at least clear that legal training, perhaps also the qualities which direct a man into the law and the disciplined activity in representing the demands of clients, produce practitioners who develop unusual skill and tenacity of purpose. Their skills turn primarily to the accomplishments of objectives and a crashing through on purely practical approaches to solutions to immediate problems. As a result there is a combination of book-learning and intellectual processes on the one hand, with the realism and energy of men of action.

The effectiveness of an able lawyer who concentrates his talents and uses the procedures of the law for the advancement of progressive views of social welfare has already been demonstrated. From time to time there has cropped up the description of such a lawyer as a "people's advocate". Perhaps the outstanding illustration of such a lawyer was Louis D. Brandeis. Rich in talent and extraordinarily effective, he undertook, on his own, legal proceedings in which he advocated the public interest where there was no adequate public representation. Here and there in a variety of ways less significant and less outstanding similar efforts have been made.

IV.
Organization and Operation of a People's Advocate

At the outset the proposal is limited to the establishment of one law office in one community—Philadelphia. It would of course be subject to revision as operations revealed the need for alteration of the plan. As a pilot project it could, if successful, be repeated in other communities and ultimately be established on a national level in Washington.

(1) *Advisory Board of Trustees.* The law office would not operate in a vacuum. The chief counsel would have the advice and assistance of a board of trustees whose primary duty and responsibility would be the determination of the specific problems which the law office should undertake. Such a board, sufficiently representative of the various disciplines and activities in the community, should be able to embrace within its field of interest and watchfulness a wide panorama of socially important cases.

(2) *Staff.* Basic to the proposal is the adequate staffing of the office with men of professional ability so that professional service could be rendered on a high level of competence.

The staff would be headed by a chief counsel. He would be assisted by three or four assistant counsel and an appropriate number of young lawyers for research work. There would also be available to the staff an economist, a political and social scientist. On a less permanent basis the office would have the means of drawing upon the services of particular experts in specific areas as the need arises. There would, of course, be the usual clerical help. Law school students would join the staff for educational purposes.

(3) *Finance.* Essential to the suc-

cessful recruitment of an adequate staff and to the permanency of the staff recruited would be the assurance in advance of the necessary finances for a ten-year period. Only in this way would it be possible for lawyers to undertake to join the staff as a career, and only in this way would be avoided the need for members of the staff to look about for future associations. Only if adequate financing was assured in advance would it be possible to recruit men on the same basis as able lawyers interested in public service can be found to accept positions on the bench and in similar professional roles.

(4) *The choice of cases.* A vast field is open from which to choose the matters in which the law office would become interested. There are civic agencies which specialize in "good government", some in various areas of government such as the merit system. There are some which specialize in housing and planning. Some specialize in civil liberties problems. By and large, these civic, volunteer agencies call on lawyer members of their boards. The legal service which they give is that of volunteers. Most often it cannot, with the best of intentions, be the equivalent of the service rendered by able lawyers to their well-paying clients. Such a lawyer, if he is a member of a large firm, can only diffidently call on his associates to contribute their effort because he himself is serving a cause as a volunteer in which he has a personal interest or dedication. There is not the great pressure for a successful result which the businessman implicitly exercises over his lawyer. The problem would be, not so much what specific areas exist, but rather which of many available should be chosen.

A rate case in Philadelphia could become the vehicle for a thorough and objective study of the private transportation system, freed from the demagoguery of politics, acted upon with professional skill and energy, motivated by an interest in ultimate long-range solution in the public interest. It would ultimately perhaps lead to questions dealing with the entire traffic and transportation problems of the greater Philadelphia area and would become a case method for coming to grips with the vast, emergent problem of metropolitan government.

A problem of civil service would result in a fresh view of the rigidities of the merit system espoused by its devotees which would be able freely to consider the objections voiced by its honest opponents. A charge of violation of political activities prohibitions in the Home Rule Charter would make possible an evaluation of these unusual provisions from a vantage point which would be free from the discontent of the office-holding politician, the unnatural piety of the out-of-office politician, and the frustration of the politically ambitious reformer. A CAB proceeding, usually lost in the great mass of data couched in the professional jargon of aviation could perhaps open the door to wide areas of government—private carrier relationships and privileges.

A case of threatened violence in the breaking of a block in closed housing situations might evolve new legal processes with which the problem might be justly dealt, or at the least by its educational process hasten the adoption of local or statewide legislation prohibiting such discrimination in housing.

In short, without multiplying illustrations, the meeting of government power with private interests and the clash of opposing private interests, leave a wide area untouched because individual interests are not so peculiarly affected that private legal representation adequately undertakes to deal with them. Where the need becomes pronounced, civic-minded individuals or agencies who usually represent the avant-garde of the merciful but are notoriously without the leadership of the powerful, try to lend a volunteer hand. In essence my proposal is to substitute for this volunteer help the same effective, tough,

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diligent effort that private business is able to secure from the leaders of the Bar.

(5) *Co-operation with a university.* The law office could well be established in co-operation with a law school which is part of a major university.

This would result in a number of advantages:

(a) The law office thus would have a channel of communication with the various departments of the university, such as those dealing with economics, social and political science, etc. Indeed, in some metropolitan universities there already exist departments dealing with planning and housing and with state and local governmental problems.

(b) Flowing from such a relationship would be the training of lawyers who have motivations of interest in social welfare. Students, training in the law office, would be taught by example how to use the weapons of the law in the advancement of these purposes and in the course of so doing they would

also receive effective training in advocacy.

(c) Advocacy could form the subject for teaching at the law school. It is a commonplace that the art of advocacy is in decline. The growth of large law firms, the increasing concentration of legal work into the hands of the "office lawyer", the enormous increase in "paper work" and the accompanying decrease in courthouse work, the decline in popular esteem for the criminal and accident Bar, where most litigation falls, all have reduced the advocate from his former position as the leader of the Bar to a position which at best is that of the courthouse aide of a large law firm of many lawyers. On the assumption that it is desirable to improve the status of the advocate and the training of future advocates, it is evident that there would be no better place than in such a law office in a teaching association with a law school. For here would be seen the law in action, yet undistorted by the oppression which clients in tight cases wield upon their lawyers. The ethics of advocacy could be taught without shame or pretense, and the skills of advocacy could be observed in action and discussed in the academic environment of the law school.

V.
Conclusion

It must, of course, be granted that one office with half a dozen practicing personnel at the most would have a limited effect.

I believe, however, that the effect, although limited would be substantial. As such an office went about its work and built its reputation for solid constructive activity, it would be recognized by the courts, the Bar and the public. In many instances its opinion ultimately would come to have a strong influence without the necessity of resorting to litigation.

But far beyond all this the example of an agency existing on a solid financial basis, practicing on a level equivalent with the best traditions of the Bar and equal to its ablest practitioners, would set in motion a long train of consequences which would far exceed its own immediate accomplishments. The encouragement given to other lawyers, the responsibility which would be created for the use of substantial legal effort in social causes, the substantiality with which such efforts would be made, would create a spirit of imitation which would influence especially young lawyers coming to the Bar with idealism as yet undiminished, an idealism which otherwise tends to be suffocated in the daily routine of private practice.

Judicial Procedure Reform:

The Leadership of the Supreme Court

by **Alexander Holtzoff** · ***Judge of the United States District Court for the District of Columbia***

▪ **The Federal Rules of Civil and Criminal Procedure are the result of a long campaign by the organized Bar to place the power to make rules of court where it belongs—in the hands of the courts. Judge Holtzoff writes of the tremendous influence that the Federal Rules have had on state court proceedings since the Rules of Civil Procedure were promulated in 1938.**

▪ The Supreme Court of the United States is naturally regarded in this country as the greatest judicial tribunal in the world. We properly contemplate it as the final arbiter of great constitutional issues as well as of other momentous questions of law in the field of federal litigation. This tribunal has had an illustrious history in these aspects of its notable activities.

In recent years it has had an additional role, which, though less spectacular and not as well understood, is, nevertheless, of outstanding significance in the history of jurisprudence. The author has reference to the part that it has played and the power with which it has been clothed, to regulate judicial procedure, both civil and criminal, throughout the federal judicial system, and to bring about improvements in that field. The results of its leadership in the struggle for reform of judicial procedure have been far-reaching and have made a more permanent and wider impress than has been generally realized perhaps even by the members of the Court themselves, because of the innate modesty that is frequently characteristic of them. This aspect of the activities of the Court deserves to be more publicized than it has been and should receive greater credit than has been accorded to it in the past. It is the purpose of this essay to call attention to this vital feature of the work of the Supreme Court.

It has been frequently said, with complete justification, that the most significant reform and the most far-reaching advance in Anglo-American jurisprudence during the past fifty years has been the drastic simplification of judicial procedure in American courts. While procedure is not the end of the law, but merely the means by which its aims are attained, nevertheless, substantive legal rights cannot be vindicated and cannot be effectively accorded to persons entitled to them unless an efficient machinery is at hand for that purpose. Therein lies the necessity for a well organized and smoothly operating judicial structure and the need for a simple, nontechnical, inexpensive procedure leading to an expeditious determination of controversies on their merits, without regard to side issues, such as questions of practice and pleading.

For the first century and a half of the existence of the federal judicial system, the outmoded traditional division between actions at law and suits in equity continued to persist. Procedure in actions at law was governed by acts of Congress, which chained the procedure on the law side of the federal courts to that existing in the courts of the state in which the federal courts sat. Thus there were as many different types of federal procedure at law as there were jurisdictions in the United States. On the other hand, at an early date the Congress reposed in the Supreme Court the power to regulate equity procedure in the federal courts by the promulgation of rules. The Supreme Court promptly did so, and amended those rules from time to time. The latest amendments to the federal equity rules came into effect in 1912. They supplanted the antiquated complex equity pleading by a new simple practice.

It was not until about twenty years ago that plenary power to regulate the entire field of civil procedure in the federal courts was vested in the Supreme Court. For centuries no substantial attempt had been made to improve or simplify procedure in

English or American courts. The medieval system of common law pleading continued to prevail. About a century ago, code pleading was introduced in many of the states. Unfortunately an inherent weakness was eventually found lurking in it because of the fact that the codes were legislative enactments completely fettering the courts and disabling them from making any needed modifications or changes. Constant amendments by legislative action gradually so encumbered code pleading with minutiae that it became almost as technical in its turn as common law pleading.

For a quarter of a century the American Bar Association conducted a persistent campaign to vest in the Supreme Court the power to regulate the entire field of civil procedure in the United States district courts. The fundamental principles of this crusade were that judicial procedure should be regulated by the judiciary and not by the legislature, and that, in fact, it was contrary to the doctrine of the separation of powers that the legislature should prescribe the mode in which the courts conduct their business. There was a second basis for this campaign, namely, that the vesting of such power in the judiciary itself would necessarily lead to a reform of procedure and its drastic simplification. The struggle was not an easy one, and at times the cause seemed almost lost. Tenacity and persistence won out in the end. In 1934 an act finally became law conferring the rule-making power on the Supreme Court in respect of civil procedure in the United States District Courts.

The Federal Rules . . . *A Far-Reaching Step*

The Supreme Court thereupon promptly and effectively assumed the burdens of the leadership which the Bar had induced Congress to bestow on that tribunal. It took a drastic and far-reaching step and exhibited farsighted vision. Its actions not only completely revolutionized federal procedure, but also have made a vital impress on the states, as will appear from the discussion that follows. Chief Justice Hughes, who both in his official and in his individual capacity was intensely interested and highly desirous of radically improving the deplorable situation then existing, made a formal announcement on May 9, 1935, that the procedural distinction between law and equity would be abolished in the federal courts, and a single form of civil action would be substituted, with the same procedure for both law and equity. He made this epoch-making pronouncement in a speech before the American Law Institute.

This brilliant step laid the foundation for the subsequent events. The Court then appointed an Advisory Committee to draft rules of practice and procedure for the district courts. This Committee was headed by former Attorney General William D. Mitchell, and was composed of a group of eminent men. Edgar B. Tolman, then regarded as the Nestor of the American Bar Association, was appointed Secretary. Dean Charles E. Clark of the Yale Law School, who later became a United States Circuit Judge and who is now the Chief Judge of the Second Circuit, was selected as Reporter. A little over a year ago, after Mr. Mitchell died, his duties devolved on Judge Clark. The product of the work of this Committee consists of the Federal Rules of Civil Procedure—the simplest and the least technical form of civil procedure yet devised in Anglo-American jurisprudence. They were duly promulgated and became effective in 1938. An order was then made by the Court in effect continuing the Advisory Committee as a standing Committee, in order that it might keep abreast of the developments in the field of civil procedure, scrutinize the mode in which the rules were administered, and recommend any amendments that might be deemed necessary or desirable from time to time. The Committee was exceedingly conservative in suggesting changes. Several were proposed and approved by the Supreme Court in 1946, but none of them were of major magnitude. A few purely minor alterations of a more or less perfunctory character were recommended and adopted on other occasions. Chief Justice Hughes and later Chief Justice Stone continuously kept in close personal touch with the work of the Committee.

Thus came into being the civil procedure that now prevails in the federal courts. The legal profession and the country as a whole owe a great debt of gratitude to the Advisory Committee on the Federal Rules of Civil Procedure, not only for the manner in which it carried out the great task devolving on it, but also for setting a pattern that was later followed by the Advisory Committee on Criminal Rules, and by committees in many of the states which have adopted the new reform.

The new civil procedure achieved such a tremendous success from the very start that it seemed desirable to extend the rule-making power to the criminal sphere. In 1942 Congress passed legislation conferring this authority on the Supreme Court. On the criminal side the federal courts were then still employing the cumbersome, technical practice that had grown up in the English courts over the centuries. For example, indictments were couched in ponderous, antiquated, Elizabethan English as late as 1946. Age-old forms of demurrers, motions to quash, pleas in abatement, and pleas in bar were still part of the stock in trade of defense counsel. The Supreme Court, following the same course that it had pursued in connection with the civil rules, promptly appointed an Advisory Committee headed by Arthur T. Vanderbilt, former President of the American Bar Association and now Chief Justice of the Supreme Court of the State of New Jersey, one of the eminent leaders of the legal profession in our time.

Most of the work of the Criminal Rules Committee took place during the incumbency of Chief Justice Stone. Throughout he was person-

ally interested in the activities of the group and kept in close touch with them from time to time. This writer, in his capacity as Secretary of the Committee, was privileged to have many conferences with him concerning the provisions of the proposed Rules, the progress of the work of the Committee, and the manner in which the final draft should be promulgated and submitted to the Congress. At least two important features of the Rules in their final form were suggested by Chief Justice Stone to the Committee through this writer. The final draft of the Federal Rules of Criminal Procedure was submitted by the Committee and was approved and promulgated by the Supreme Court within a month or two thereafter and then formally transmitted to the Congress. They became effective in March, 1946, and have governed federal criminal procedure ever since. It would be almost superfluous to remark that they constitute probably the simplest and the least technical form of criminal procedure in any Anglo-American jurisdiction, combining potentialities for efficiency and expedition on the one hand, with complete protection of the rights of the defendant on the other.

The Federal Rules . . . *A Wide Influence*

As frequently happens with broad, progressive movements, the champions of the great reform of judicial procedure built better than they knew. The influence of their leadership extended its sway far beyond the confines of the area within which they labored. The reform did not stop with the federal courts. Gradually many of the states joined the procession and adopted the new civil procedure. This result was undoubtedly due, in large part, to the moral influence of the Supreme Court of the United States, which extended far beyond the field in which that tribunal exercised its legal authority. Colorado, Arizona and New Mexico were the first states to adopt the new procedure. They did so almost immediately after the Federal Rules became effective. One by one other states followed the same course. Among them were Utah, Iowa, Nevada and Minnesota. States lying east of the Mississippi River came into the fold more slowly. Several years ago, Kentucky finally adopted the new rules, and in September, 1948, when Chief Justice Vanderbilt became head of the Supreme Court of New Jersey, he brought that state into line. Delaware, one of the last bulwarks of common law pleading, finally threw it into the discard and in 1948, adopted the new rules. Missouri, North Dakota, Idaho and West Virginia are now going through the process of introducing federal procedure. In most instances the reform was not achieved easily. A hard struggle and a campaign of education sometimes enduring for years was required in every state in order to overcome inertia and active opposition. The leadership and the example set by the Supreme Court of the United States was the beacon that lighted the path of progress. The American Bar Association through its Section of Judicial Administration has continuously been fighting for this reform and is continuing to do so. In fact, one of the minimum standards of judicial administration urged by the Section is the conferring of rule-making power on the judiciary and simplification of procedure.

A number of states that did not accept the Federal Rules as a body have nevertheless adopted and introduced a number of the salient features of federal procedure. Among them are Maryland and Texas. In addition, as a result of the impact of the reform movement, some states drastically simplified their procedure, without introducing the federal practice. Among them are Florida, Illinois and Rhode Island.

The Federal Rules of Criminal Procedure have likewise proved a model to the states. Since they came into effect twelve years after the advent of the civil rules, there has not been as much time for their introduction into the states as has been the case with the civil rules. Nevertheless, several states have made them a part of their own local procedure. Among them are New Jersey and Missouri.

The reform movement as it affects the states is now in its heyday and is active in many of the states. Some of them, including several of the larger ones, such as New York and California, are lagging behind and are hesitating to confer the rule-making power on the judiciary, or to introduce the simplified practice into their own tribunals. In part, this is due to inertia and apathy and, in part, to active antagonism. Yet everywhere progressive members of the Bench and Bar have organized to advocate and urge the necessary changes. They are forging ahead, sometimes slowly, against tenacious opposition. Their activity cannot cease. The aim will not be attained until every one of the states has simplified its judicial procedure, both on the civil and criminal sides, for that is the crying need in the administration of justice in the United States.

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In addition, even if the time should come when the simple uniform procedure is adopted by all the states—and this is a Utopia that is hardly likely to be reached in the near future—the reform movement must nevertheless be kept alive in order that the procedure may not become gradually stereotyped and petrified, but may remain flexible. Flexibility is of the essence. It is indispensable that continuous scrutiny be made of the practical operation of the new procedure in order that its liberal application may be continued, and modifications and adjustments may be introduced when they appear necessary. Changes should, indeed, be made conservatively and deliberately. This has been the policy since the adoption of the new rules. It must be recognized, however, that occasional alterations will become desirable from time to time. It is indispensable that there be some one charged with the duty of watching the progress of events and proposing any adjustments when they become necessary.

The brilliant leadership of the Supreme Court in this important field, which had its inception in 1934, undoubtedly will continue.[1] It is obviously needed. Its moral influence and its example light the path of those who are interested, and who are actively seeking to bring about this great reform throughout the country. It even encourages the judiciary of the states to be willing to undertake the task upon which the great tribunal entered some years ago for the federal judiciary.

While the framework of both the civil and criminal rules is Spartan in its simplicity like a Doric temple, it has the capacity to endure the normal stress and strain associated with any architectural structure. Yet, in reality, the rules must occasionally change with a slow motion evolving perceptibly from day-to-day experience. These changes must be guided by the Supreme Court. In no sphere is its wisdom more apparent, or its authority adorned with greater dignity and knowledge, than in maintaining the unity and simplicity of practice and procedure in the judicial systems of the United States and by its influence and example setting the pace for the states.

The nationwide movement for simplification of judicial procedure must continue unabated. It is along the lines of the ideals enunciated by Lord Brougham over a century ago.[2]

> It was the boast of Augustus . . . that he found Rome of brick, and left it of marble. . . . But how much nobler will be the sovereign's boast when he shall have it to say that he found law dear, and left it cheap; found it a sealed book, left it a living letter; found it the patrimony of the rich, left it the inheritance of the poor; found it the two-edged sword of craft and oppression, left it the staff of honesty and the shield of innocence.

1. While the Supreme Court has recently dissolved the Advisory Committee on Federal Rules of Civil Procedure, it is rather assumed that a new one will be appointed. In fact, the Judicial Conference of the United States has recommended the creation of a new committee.

2. Brougham and Vaux, 10 WORKS 304-305 (1855-61).

A Contrast in Viewpoint:

Lawyers in the United States and Russia

by **David F. Maxwell** • ***President of the American Bar Association***

▪ President Maxwell was a member of the group of leaders of the Association that paid a visit to the Soviet Union last summer to study first hand the Soviet system of judicial administration. Addressing the Missouri Bar last October, Mr. Maxwell summed up his impression of the Soviet system of "justice" under the current Russian regime.

▪ Recently I had the still somewhat unusual experience of a visit to Russia. As a member of an American Bar Association delegation, I went there for the purpose of observing at first hand the Soviet system of administering justice. I wanted to know something of the status of law and lawyers in that country and to determine whether the legal and judicial systems there offer any real protection to the average citizen—whether the Soviet conception of justice bears any resemblance to the system we know.

In this era in which two divergent ideologies are competing for the allegiance of millions of people in the world, it seems to me one of the most crucial elements of the conflict is their respective attitudes toward justice for the average man. What I propose to do therefore, is to tell you something of the Russian system as I saw it and to point out what I conceive to be the fundamental differences between that system and ours.

These differences were not all apparent on the surface. In Russia we saw many fine buildings devoted to teaching law and administering justice. We observed the proceedings within those buildings. The proceedings were explained to us carefully and at length by our Russian guides. But the more the guides told us, and the more we saw, the more we wondered and doubted whether justice, as we understand that word, actually exists in the Soviet Union.

Even as we inspected the Russian government buildings and the courts, and even as we noted the architectural splendor of many of them, it was brought home to us that their physical evidence of the role of law in the Communist society is an illusion. The basic difference that impressed itself upon us was one of the attitudes. Our own system of law, while it relies to a certain extent upon the outward evidences of stability and dignity that go with impressive buildings and courtrooms, does not in fact derive its strength and virtue from fine buildings and equipment or even from the fine phrases of our written charters and statutes.

These are but the framework for a deeper meaning, a more lofty viewpoint, established upon belief in a higher power, a Supreme Creator of the universe, and our relation to Him as fallible and mortal beings. If in our endeavors to master the principles of our law we miss this, we miss the heart and core of our legal system, and our labor is in vain.

In Russia, where religion is grudgingly tolerated by the state but constantly downgraded, the legal and judicial system is utterly lacking in the moral and spiritual influences which are basic to any truly just and lasting system for the adjudication of differences among men and the maintenance of their fundamental rights.

As you all know, and as the present rulers of Russia freely admit, court proceedings under Joseph Stalin were to an overwhelming extent merely a travesty of justice. But the present rulers of Russia have said they are changing all this. They say reform is now the watchword, that things now are going to be entirely different.

On the way home after our visit, much as we appreciated the hospitality we received and the trouble taken to explain things to us, I could not help but conclude that,

new regime or no, the viewpoint has not changed—that within the fine structures the Russians have dedicated to law and justice, the same old system prevails.

It can't help but be that way. The words of the charters and laws are much the same there as they are here, but the meaning is not the same. The meaning is not the same because the viewpoint is different.

Let us see in what other ways that difference manifests itself. One such way lies in our hallowed doctrine of separation of powers.

That doctrine was the mighty concept of our founding fathers, derived perhaps from a consideration of the English Constitution and the writings of certain French philosophers. In our government now, and we hope forever, the lawmaker, the law enforcer and the law judge are separate, independent, and co-equal. Moreover, to each is given certain powers to hold the others in check against the possibility of capricious tyranny and usurpation. Thus we say that ours is a government of laws and not of men.

In Russia under Stalin there was no such division of powers. By pyramidal stages all power flowed into the Presidium of the Soviet Union, and there Stalin was absolute boss. In his single person were vested the powers of lawgiver, law enforcer and chief magistrate. The Soviet Constitution had no meaning except that which Stalin gave it. Its guarantees of liberty meant only what Stalin wanted them to mean.

Stalin's Death . . . *A "New Justice"*

After Stalin died, March 5, 1953, was there any change in this pyramidal flow of power to the Presidium? We can determine this by noticing the operation in December, 1953, of the so-called Kirov Law of 1934. The occasion was the trial of the arch terrorist of the Soviet Police, L. P. Beria.

The Kirov Law concerns cases involving terrorist organizations and terrorist acts against the Soviet State. It provides that

(1) The investigation be concluded in not more than ten days;

(2) The indictment be presented to the accused only twenty-four hours before hearing the case in open court;

(3) The accused be denied the benefit of counsel;

(4) The sentence of the court to be final and executed immediately.

This Kirov Law guided the Public Prosecutor in the Beria case. He conducted his preliminary investigation as is the Russian practice. He concluded that Beria and the other co-defendants were guilty. He issued an indictment December 17, 1953, charging twenty-six offenses. Attached to the indictment were supporting documents, testimony of numerous witnesses and "confessions" of all the defendants.

A special session of the Supreme Court convened to try the cases began its sessions on December 18 and sat until December 23. Eight men composed the court, representing the four divisions of the Soviet State system of power—the Army, the Party, the trade unions and the judiciary. The Chairman was I. S. Konev, Marshal of the Soviet Union. Another member was K. S. Moskalenko. The trial ended by sentence of death by shooting and on December 24, 1953, our Christmas Eve, the Soviet newspapers carried the terse announcement:

> Yesterday, the 23rd of December, the sentence of the special judicial commission of the U.S.S.R. as regards Beria, et al. condemned to the highest degree of criminal punishment—shooting—was carried out.

Thus, less than a fortnight elapsed between the disclosure of the indictment and the death sentence. It is clear, therefore, that this was not the independent action of an independent court, but the direct application of power from the top of the pyramid of power, however strictly the formality—or rather ritual—of a legal procedure was followed.

So, what apppeared to be a separation of powers in form remained a unity of power in substance, and this has been admitted by present members of the Soviet Presidium, notably N. Khrushchev and Premier Bulganin, in public statements. The words are the same, but the viewpoint was different.

When our delegation was in Russia we interviewed jurists, lawyers and officials high in the Communist Party. We were told that the Kirov Law had been repealed, that now all defendants were entitled to counsel of their own choice, that they were entitled to confront the witnesses against them in open court, to cross-examine them, and to appeal for review of a sentence deemed unjust. Closer questioning revealed that the repealer law expressly excepted cases involving treason and terrorism, so that the Presidium or lawgiver, law enforcer and chief magistrate, still has the right to prosecute political offenders under the old system. And the range of "political" has remarkable elasticity. It stretches far and wide.

We were told that the Soviet courts no longer allow convictions based solely on confession without corroborating evidence. We were told that Vishinsky, prosecutor of the Beria trials, has been downgraded and his theory of law enforcement repudiated, and that in his place as Attorney General they now have Rudenko, who participated in behalf of Russia in the prosecution of war criminals at the Nuremberg trials.

New Machinery . . . *The Same Old Viewpoint*

The machinery is changed, but the viewpoint remains the same. The individual is still a creature of the state. He has no good except the good of the state. Any distortion of the principles of justice may be rationalized by saying that it is necessary for the preservation of the state.

So the "liberties" which the Soviet leaders now appear to be extending to their people may be an

illusion. The Presidium still maintains absolute unchallenged control of all the state functions, lawgiving, law enforcement and law judging. If within its tight circle of eleven men a fight for power should break out, we may see an abrupt withdrawal of the present privileges and a renewal of Stalinist tyranny.

And this was indeed tyranny. Hear how Khrushchev, speaking to the 20th Party Congress in Moscow February 25, 1956, denounced Stalin's atrocities. To quote but a single excerpt:

> Many thousands of honest and innocent Communists have died as a result of this monstrous falsification of such "cases", as a result of the fact that all kinds of slanderous "confessions" were accepted, and as a result of forcing accusations against one's self and others.

It is significant that Khrushchev frankly admits that the Central Committee of the Communist Party could not cope with the situation because, to put it in his words, "Stalin thought that now he could decide all things alone."

Notice that throughout his denunciation of Stalin's terrorism of the people, Khrushchev's worry is for the "innocent" members of the Party who suffered. He is not at all concerned with the thousands and thousands of others whom he blandly admitted were likewise exterminated for entertaining views inconsistent with those of the Communist Party. Nor is he bothered by the system of justice which condones such wholesale murders.

To quote again from his speech:

> Meanwhile Beria's gang which ran the organs of state security, outdid itself in proving the guilt of the arrested and the truth of materials which it falsified. And what proofs were offered? The confessions of the convicted and the investigation judges accepted these "confessions".
>
> And how is it possible that a person confesses to crimes which he has not committed? Only in one way—because of application of physical methods of pressuring him, tortures, bringing him to a state of unconsciousness, deprivation of his judgment, taking away his human dignity. In this manner were "confessions" acquired.

Khrushchev made no bones that neither the Central Committee nor the Soviet Congress could do anything to prevent Stalin's criminal deeds, thus demonstrating clearly that the whole concept of the communist state is hopelessly wrong. And it is wrong because the power to investigate, to prosecute and to try are vested in the same agency and that agency takes its orders from the Central Committee of the Communist Party. The words are the same but the viewpoint is different.

The difference in viewpoint we have been speaking of concerns the failure to separate the functions of lawgiver, law enforcer and judge. But it extends much further in its effects.

Take the matter of the record—which of course is what the lawyer is most concerned with in the trial of a case in our courts. We try diligently to avoid error of law and fact. We guard against intrusion of bias, prejudice and favoritism. We strive to extend to the innocent every opportunity for vindication and require the closest adherence to rules of procedure tested over the centuries and found to be best to promote justice.

In Russia the word "record" is not unknown. They too have records of their court proceedings. But their records serve a different purpose. That purpose is not to avoid or correct error or to remedy injustice. Russian records are intended to support and justify to the Party and the public the decision of the court, whatever that may be.

Now this is a very subtle thing. It is a trap that yawns wide in every judicial proceeding. It is so easy to lapse into the vice of perverting the record to support a foregone conclusion, or to serve some expedient policy. When the lawgiver, the law enforcer, and the judge are one individual, the perversion of a record in that manner is almost inevitable.

Now what happens when you pervert records? We saw what happened to the arch perverter of records, L. P. Beria. The snare he laid trapped him. The pit he dug, he fell into himself. It is not the words "right of appeal" that are the guarantee of liberty. It is the viewpoint. It is the viewpoint that would pervert a record which must be the object of our eternal vigilance. It is the viewpoint of the pyramid of power that we must guard against. No more dangerous trap exists in the field of justice than this one—the temptation to pervert a record.

The pyramidal system of power has its effect also in the meaning of such a safeguard of justice as "the presumption of innocence". Russia asserts this presumption. They say "an accused is innocent until proved guilty". But what about the meaning and the viewpoint?

That depends on what you mean by "proof". We mean proof by due process of law. That is, prior notice, an opportunity to be heard in person or by counsel and to be advised of the accusation, to be tried only by testimony in open court in the presence of the accused with right of cross-examination.

What does the presumption of innocence mean in Russia? What did it mean in the Beria case we referred to a moment ago?

In Russia the proof is gathered by the Public Prosecutor before trial and his finding of guilt or innocence, based on his investigation, is what determines the outcome of the trial. The trial itself is little more than an official cachet, a legalizing stamp, a Good Housekeeping Seal of Approval, affixed to the Public Prosecutor's work.

We submit, and our viewpoint is, that where there is a separation of powers, where there is a government of laws and not of men, no man's word is above question. No one-sided investigation can establish a presumption of guilt, or destroy the presumption of innocence. It is for the court after trial to find guilt or innocence, and not the agency of law enforcement.

But this slight shift of viewpoint which so gradually engulfs the pre-

sumption of innocence is a very subtle trap. It is easy to fall into. And it can slam shut on those who set it. The words do not change. The change is in the viewpoint.

It was claimed by the Russians that Beria was a military man—not in justification of the manner in which the trial was conducted, but rather in explanation of the proof offered in support of the conspiracy charge. But whether it be considered a civil trial or a military trial, such a travesty of justice could not happen in this country today either in a court-martial proceeding or in a civil court of oyer and terminer.

The adoption of the Uniform Code of Military Justice in 1950 has completely eradicated any resemblance between the Beria type of trial and the conduct of our courts martial.

The Code goes a long way toward establishing in the military the principle of separation of powers which distinguishes the American system of jurisprudence from that of the Soviet Republics. Under Article 26 the law officer serving on a court martial is clothed with all of the authority of a judge. He has been made independent of the other members of the court and is charged with the duty of instructing his associate officers on the elements of the offense, the presumption of innocence and the burden of proof.

In separating the legal officers from the other members of the panel, I submit that the Code has in effect provided for a trial by a judge and jury—the legal officer functioning as the judge and his associate officers as the jury.

The Code likewise insures the accused of a right of appeal to a separate court whose members owe no allegiance to the command which initiated the prosecution, thus removing the administration of military justice in this country one step further from the Russian system. As I understand it, the Court of Military Appeals has the obligation to see to it that constitutional rights and procedural due process are extended to military personnel on the same basis as is accorded civilians accused of crimes.

The Words Are the Same . . . *The Viewpoint Is Different*

In Russia, as I have said, the words are the same, but the viewpoint is different—the difference is vital and compelling to those who have the misfortune to be haled before the bar of justice in Russia.

But the difference is equally vital and compelling to lawyers. For how can lawyers perform their function of advocacy when they are absorbed into and made a part of the pyramid of power? How can lawyers serve any useful purpose if the constitution is what the Presidium says it is, if the record is only propaganda, if the presumption of innocence has ceased to exist before the trial begins?

That is why the presidium of the Central Committee of the Communist Party has no time for lawyers.

In the Soviet Republics the lawyers have fallen to a low state indeed. They have been stripped of every vestige of independent thought and action and have become for all practical purposes tools of the state.

All of them are required to be members of a union and of a union not even confined to lawyers. In Moscow it is known as the Installation of Government Workers of whom the lawyers comprise only a small fraction of the membership. The installation is controlled by a presidium chosen by the Communist Party. It is this presidium which fixes and collects the fees in all cases handled by the lawyer members. Of the amounts collected 70 per cent goes to the lawyer and 30 per cent is retained by the presidium to defray administration costs and pay the salary of the President of the presidium. Young lawyers are paid a pittance allowance of 600 rubles per month (equivalent to $150 at the official rate of exchange) and 7 per cent of the fund is set aside for lawyers' vacations.

Is it any wonder that lawyers in the Soviet Republics are fortunate if they average 1100 to 1500 rubles per month and the customary salary for judges is 1200 rubles?

Actually there is little for the lawyers to do in the U.S.S.R. As you know, the government owns all the property and conducts all business. Since the lawyer is an arm of the government, he is in no position to sue his employer. Consequently his function is reduced to handling small cases between individuals and the defense of persons accused of crime.

Is it then surprising that there are only 12,000 lawyers in the Soviet Union engaged in private practice, serving a population estimated at 200,000,000 people and of these 10,000 are in the so-called Russian Federation, which includes Moscow and Leningrad, the two largest cities? We were told reliably that in the City of Moscow there are but 1200 active practitioners serving a population of between 6 and 7 million people.

Contrast that with the United States where as of the end of 1955 there were 241,000 lawyers for a population of 167,000,000 or a city like Philadelphia where there are approximately 4000 lawyers for a population of 2,000,000.

These figures speak more eloquently than words. They make it abundantly clear that there is no place in a totalitarian state for independent lawyers.

Not too many years ago the Communists were distributing literature in this country denouncing the lawyers. One of these leaflets was entitled "Professionals in the Soviet America". It could be purchased at any newstand for 5 cents. Here is what they said:

> There is one group of professionals in America who will be liquidated along with the bourgeois. Lawyers under capitalism are trained as servants of the system of class justice which will soon become obsolete. To the 160,000 lawyers in the United States [according to the latest available reports there are now 241,000] we can only say that there will be

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A Code of Trial Conduct:

Promulgated by the College of Trial Lawyers

▪ Meeting in Dallas, Texas, last August, the American College of Trial Lawyers adopted a "Code of Trial Conduct", which is published on these pages. The Code is the result of more than three years' effort by the members of the College, and, like the trial drafts that preceded it, was scrutinized by trial lawyers from all parts of the United States. The College of Trial Lawyers is aware of the fact that there are imperfections in the Code and requests that Journal readers send their suggestions and criticisms to the national headquarters of the College, at 921 Westwood Boulevard, Los Angeles 24, California.

PREFACE

▪ The American College of Trial Lawyers is a national voluntary association of members of the Bars of the several states who devote themselves in major part to trial advocacy on behalf of public and private clients in all fields of law and on both sides of the trial table in the *nisi prius* courts of the nation and before state and federal administrative agencies, boards, commissions and bureaus. A great many members of the Society take an active part in the work of the organized Bar of the nation and of their respective states, districts and local communities, especially those activities of the organized Bar that are directed to the fields of practice, pleading and procedure, preparation and trial of cases, court organization and administration, litigation procedures, judicial selection and tenure, and improvement of the administration of justice.

The members of the society have particular interest in maintaining high standards of professional conduct and deportment in the courtroom and hearing room. There is but little in the way of published materials and lore, either in this country or in England, on the subject of trial conduct. A few years ago it was suggested to the officers and Board of Regents of the College that a code of standards of trial conduct for the trial lawyer be prepared and published. A special committee of distinguished trial lawyers, under the chairmanship of Clarence Runkle, a Judge of the Superior Court of California in and for Los Angeles County, was appointed. The committee enlisted the aid, comments and suggestions of members of the society across the nation, of trial judges of state and federal courts, and of presiding officers of state and federal administrative agencies. A wealth of comments and suggestions was received. A careful study was made of published decisions, law reviews and legal periodicals, legal history and various trial lore. Drafting and redrafting ensued. After several years of work a tentative final draft of a Code of Trial Conduct for the Trial Lawyer resulted. It was approved by the Board of Regents and adopted by the members of the College at the annual meeting held in Dallas, Texas, in August, 1956.

As stated in the Preamble, the Code is intended to supplement and stress certain portions of, but not to supplant, the Canons of Professional Ethics promulgated by the American Bar Association. The standards advanced are minimum standards. An unexpressed but ever present over-all consideration is that the trial lawyer is an officer of the court and is in the last analysis a gentleman. He should at all times conduct himself with these considerations in mind. He is engaged in a profession and not a business.

This Code of Trial Conduct for the Trial Lawyer is published by the College and distributed to trial lawyers and judges of courts of record and presiding officers of major administrative hearing agencies throughout the nation in the hope that it will serve the dignity of the law, improve the administration of justice, advance decorum in the court and hearing room and aid in maintaining high standards of personal and professional conduct on the part of trial advocates throughout the United States.

So far as is known, this is the first time any lawyer group has undertaken to promulgate a code of standards of ethics, deportment and conduct for the trial lawyer.

We are aware that the Code has imperfections, despite the devotion of the special committee to its task. Constructive suggestions and criticisms are invited.

AMERICAN COLLEGE
OF TRIAL LAWYERS

CODE OF TRIAL CONDUCT

Preamble

▪ Lawyers who engage in trial work have a specific responsibility to strive for prompt, efficient, ethical, fair and just disposition of litigation. The American Bar Association has promulgated Canons of Professional Ethics for the legal profession as a whole. The American College of Trial Lawyers, because of its particular concern for the improvement of litigation proceedings and trial conduct of counsel, presents this Code of Trial Conduct for trial lawyers, not to supplant but to supplement and stress certain portions of the Canons of Professional Ethics. Generally speaking, the purposes and objectives of this Code are embodied in the following considerations:

To his client, the lawyer owes undivided allegiance, the application of the utmost of learning, skill and industry, and the employment of all honest and appropriate means within the law to protect and enforce legitimate interests. In the discharge of this duty, the lawyer should not be deterred by any real or fancied fear of judicial disfavor or public unpopularity, nor should he be influenced, directly or indirectly, by any considerations of self-interest.

To opposing counsel, the lawyer owes the duty of courtesy, candor in the pursuit of the truth, co-operation in all respects not inconsistent with his client's interests and scrupulous observance of all mutual understandings.

To the office of judge, the lawyer owes respect, diligence, candor and punctuality, the maintenance of the dignity and independence of the judiciary, and protection against unjust and improper criticism and attack.

To the administration of justice, the lawyer owes the maintenance of professional dignity and independence and conformity to the highest principles of professional rectitude, notwithstanding the desires of his client or others.

This Code expresses only minimum standards and should be construed liberally in favor of its fundamental purpose, consonant with the fiduciary status of the trial lawyer, and so that it shall govern all situations whether or not specifically mentioned herein.

1. Acceptance of Employment in Civil Cases.

In civil litigation, the lawyer should decline to prosecute a cause or assert a defense obviously devoid of merit, or which is intended merely to inflict harassment or injury, or to procure an unmerited settlement, or in which he, his firm or associates have conflicting interests.

2. Continuance of Employment in Civil Cases.

After acceptance of employment the lawyer, unless discharged, should diligently conduct the cause to an expeditious conclusion. He may not withdraw except at a time or in circumstances when the withdrawal will not adversely affect the interests of the client. He may withdraw at any time with the consent of the client or with the approval of the court if a procedure for obtaining approval exists, or if his continuance in the representation of the client will involve his knowing participation in the perpetration of a fraud. Upon withdrawal after receipt of retainer, the lawyer should refund any portion thereof that has not been earned.

3. Employment in Criminal Cases.

Every person accused of crime has a right to a fair trial, including persons whose conduct, reputation or alleged violations may be the subject of public unpopularity or clamor. This places a duty of service on the legal profession and, even though the lawyer is not bound to accept particular employment, requests for service in criminal cases should not lightly be declined or refused merely on the basis of the lawyer's personal convenience or opinion concerning the guilt of the accused, or repugnance to the accused or to the crime charged.

4. Conduct of Criminal Cases.

(a) Having accepted employment in a criminal case, the lawyer's duty, regardless of his personal opinion as to the guilt of the accused, is to invoke the basic rule that the crime must be proved beyond a reasonable doubt by competent evidence, to raise all valid defenses and, in case of conviction, to present all proper grounds for probation or mitigation of punishment. A confidential disclosure of guilt alone does not require a withdrawal from the case. However, after a confidential disclosure of facts clearly and credibly showing guilt, the lawyer should not present any evidence inconsistent with those facts. He should never offer testimony which he knows to be false.

(b) The crime charged should not be attributed to another identifiable person unless evidence introduced or inferences warranted therefrom raise at least a reasonable suspicion of that person's probable guilt.

(c) The prosecutor's primary duty is not to convict, but to see that justice is done. Credible evidence that might tend to prove the accused's innocence should not be suppressed.

5. Acquiring Interest in Litigation.

A lawyer should never purchase or otherwise acquire, directly or indirectly, any interest in the subject matter of the litigation which he is conducting, provided, however, that nothing herein shall prohibit a just and reasonable contingent fee contract.

6. Lawyer as Witness.

When a lawyer knows, prior to trial, that he will be a necessary witness, except as to merely formal matters such as identification or custody of a document or the like, neither he nor his firm or associates should conduct the trial. If, during the trial, he discovers that the ends of justice require his testimony, he should, from that point on, if feasible and not prejudicial to his client's case, leave further conduct of the trial to other counsel. If circumstances do not permit withdraw-

al from the conduct of the trial, the lawyer should not argue the credibility of his own testimony.

7. Personal Experiments.

A lawyer should never conduct or engage in experiments involving any use of his own person or body except to illustrate in argument what has been previously admitted in evidence.

8. Discretion in Co-operating with Opposing Counsel.

The lawyer, and not the client, has the sole discretion to determine the accommodations to be granted opposing counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments and admission of facts.

9. Relations with Opposing Counsel.

(a) A lawyer should adhere strictly to all express promises to and agreements with opposing counsel, whether oral or in writing, and should adhere in good faith to all agreements implied by the circumstances or by local custom. When he knows the identity of a lawyer representing an opposing party, he should not take advantage of the lawyer by causing any default or dismissal to be entered without first inquiring about the opposing lawyer's intention to proceed.

(b) A lawyer should avoid indulgence in disparaging personal remarks or acrimony toward opposing counsel, and should remain wholly uninfluenced by any ill feeling between the respective clients. He should abstain from any allusion to personal peculiarities and idosyncracies of opposing counsel.

10. Witnesses.

(a) A lawyer should thoroughly investigate and marshal the facts. Subject to the provisions of Paragraph 11 hereof, he may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of the opposing counsel or party. He should avoid any suggestion calculated to induce any witness to suppress evidence or deviate from the truth. He should avoid taking any action calculated to secrete a witness. However, except when legally required, it is not his duty to take affirmative action to disclose any evidence or the identity of any witness.

(b) A lawyer should not participate in a bargain with a witness either by contingent fee or otherwise as a condition of his giving evidence, but this does not preclude the payment of reasonable and non-contingent compensation for actual loss of time and expenses of persons who cannot afford to attend or will not appear and testify for the statutory fees; nor does it preclude payment of non-contingent fees to expert witnesses.

(c) A lawyer may advertise for witnesses to a particular event or transaction but not for witnesses to testify to a particular version thereof.

(d) A lawyer should never be unfair or abusive or inconsiderate to adverse witnesses or opposing litigants, or ask any question intended only to insult or degrade the witness. He should never yield, in these matters, to suggestions or demands of his client or allow any malevolence or prejudice of the client to influence his actions.

(e) A lawyer should not ask questions which affect the witness' credibility only by attacking his character, except those encompassed in recognized impeachment procedures.

11. Communications with Opposite Party.

A lawyer should not in any way communicate upon the subject of controversey with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. He should avoid everything that might tend to mislead a party not represented by counsel, and he should not undertake to advise him.

12. Relations with the Judiciary.

A lawyer should never show marked attention or unusual hospitality to a judge, uncalled for by the personal relations of the parties. He should avoid anything calculated to gain or having the appearance of gaining special personal consideration or favor from a judge.

13. Trial Conduct Toward Judge.

(a) During the trial, the lawyer should always display a dignified and respectful attitude toward the judge presiding, not for the sake of his person, but for the maintenance of respect for and confidence in the judicial office. It is both the right and duty of the lawyer fully and properly to present his client's cause and to insist on an opportunity to do so. He should vigorously present all proper arguments against rulings he deems erroneous and see to it that a complete and accurate case record is made. In this regard, he should not be deterred by any fear of judicial displeasure or even punishment. The lawyer, regardless of fear, threat or imposition of punishment, should not reveal the confidences of his client.

(b) A lawyer should not discuss a pending case with the judge without the opposing lawyer's presence, unless, after notice, or request, the opposing lawyer fails or refuses to attend and the judge is so advised.

(c) Except as provided by rule or order of court, a lawyer should never deliver to the judge any letter, memorandum, brief or other written communication without concurrently delivering a copy to opposing counsel.

(d) Subject to the foregoing, a lawyer may advise the judge of any reason for expediting or delaying the decision.

14. Jury.

(a) A lawyer should scrupulously abstain from all acts, comments and attitudes calculated to curry favor with any juror, such as fawning, flattery, actual or pretended solicitude for the juror's comfort or convenience, or the like. Before and during the trial, he should avoid conversing or otherwise communi-

cating with a juror on any subject whether pertaining to the case or not.

(b) A lawyer should disclose to the judge and opposing counsel any information of which he is aware that a juror or a prospective juror has or may have any interest, direct or indirect in the outcome of the case, or is acquainted or connected in any manner with any lawyer in the case or any partner or associate or employee of the lawyer, or with any litigant, or with any person who has appeared or is expected to appear as a witness, unless the judge and opposing counsel have previously been made aware thereof by *voir dire* examination or otherwise.

(c) It is the lawyer's right, after the jury has been discharged, to interview the jurors to determine whether their verdict is subject to any legal challenge.

(d) Before the jury is sworn to try the cause, a lawyer may investigate the prospective jurors to ascertain any basis for challenge, provided there is no communication with them, direct or indirect, or with any member of their families.

(e) A lawyer should, immediately upon his discovery thereof, make full disclosure to the court of any improper conduct by any person toward the jury or any member thereof.

15. Courtroom Conduct.

(a) In the *voir dire* examination of the jury, a lawyer should not state or allude to any matter not relevant to the case or which he is not in position to prove by admissible evidence.

(b) A lawyer should not state as fact in his opening statement any matter unless he has reason to believe that it will be substantiated by the evidence.

(c) A lawyer should never misstate the evidence or state as fact any matter not in evidence, but otherwise has the right to argue in the manner he deems effective, provided his argument is mannerly and not inflammatory.

(d) A lawyer should not include in the content of any question the suggestion of any matter which is obviously inadmissible.

(e) A question should not be interrupted by an objection unless the question is then patently objectionable or there is reasonable ground to believe that matter is being included which cannot properly be disclosed to the jury.

(f) A lawyer should conduct the *voir dire* examination and the examination of all witnesses either from the counsel table or other suitable distance except when handling documentary or physical evidence or when a hearing impairment or other disability requires that he take a different position.

(g) In all cases in which there is any doubt about the propriety of any disclosure to the jury, requests should be made for leave to approach the bench and to obtain a ruling out of the jury's hearing, either by making an offer of proof or by propounding the question and obtaining an immediate ruling.

(h) A lawyer should not assert in argument his personal belief in the integrity of his client or of his witnesses or in the justice of his cause, as distinct from a fair analysis of the evidence touching those matters.

(i) A lawyer should not engage in exchanges of banter, personalities, argument or controversy with opposing counsel. His objections, requests and observations should be addressed to the judge.

16. Courtroom Decorum.

(a) A lawyer should rise when addressing, or being addressed by, the judge, except when making brief objections or incidental comments.

(b) While the court is in session a lawyer should not smoke, assume an undignified posture, or, without the judge's permission, remove his coat in the courtroom. He should always be attired in a proper and dignified manner and abstain from any apparel or ornament calculated to attract attention to himself.

17. Punctuality and Expedition.

(a) A lawyer should be punctual in all court appearances and, whenever possible, should give prompt notice to the court and to all other counsel in the case, of any circumstances requiring his tardiness or absence.

(b) A lawyer should make every reasonable effort to prepare himself fully prior to court appearances. He should promptly inform the court of any settlement, whether partial or entire, with any party, or the discontinuance of any issue.

(c) A lawyer should see to it that all depositions and other documents required to be filed are filed promptly, should stipulate in advance with opposing counsel to all non-controverted facts, should give opposing counsel, on seasonable request, an opportunity in advance to inspect all non-impeaching evidence of which the law permits inspection, and, in general, should do everything possible to avoid delays and to expedite the trial.

18. Candor and Fairness.

(a) The conduct of the lawyer before the court and with other lawyers should at all times be characterized by candor and fairness.

(b) A lawyer should never knowingly misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or, with knowledge of its invalidity, cite as authority a decision that has been vacated or overruled, or a statute that has been repealed; or in argument assert as a fact that which has not been proved, or, in those jurisdictions in which a side has the opening and closing arguments, mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

(c) A lawyer should be extraordinarily careful to be fair, accurate and comprehensive in all *ex parte* presentations and in drawing or otherwise procuring affidavits.

(d) A lawyer should not offer evidence which he knows is inadmissi-

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A Guide for Lawyers:

How To Read CPA's Certificate and Report

by **Louis S. Goldberg** · *of the Iowa Bar (Sioux City)*

▪ Mr Goldberg is both a lawyer and an accountant. His earlier article "Accounting in a Nutshell: A Guide for Lawyers", appeared in our June, 1953, issue. While this is a sequel, it stands independently of the other, and is concerned with a different phase of accounting as it affects the lawyer's practice.

▪ What is a CPA certificate? What is a CPA opinion? An unqualified certificate? A qualified certificate? A disclaimer of opinion? An audit report? An audit? This essay seeks to supply answers to those questions –answers that will be meaningful to the lawyer in his law practice.

These are vital phases of accounting practice, the media through which the accountant speaks to the lawyer and the public. How to read the CPA certificate and the CPA report, respecting which grave misconceptions are common, should be made known to the lawyer. Too many lawyers still believe that every statement that issues from the office of the accountant represents an audit, an audit report and an unqualified opinion of the auditor. "That every like is not the same, O Caesar, The heart of Brutus earns to think upon!" The attorney should, at the least, achieve an awareness of the distinctions between an unqualified opinion of the CPA report, and the qualified opinion, and the "no opinion" report and recognize the presence or the absence of one or the other. The literature usually made available to the lawyer is virtually silent on the subject of auditing and the audit report. Even so excellent a work as that of the American Law Institute, *Basic Accounting for Lawyers,* in its 127 pages devotes but a single page (page 7) to accountants' certificates or opinions. No more than a portion of a page (at page 83) is awarded to the subject of auditing and the audit report in *Lawyer's Guide to Accounting,* a book of some 300 pages published in 1955, which in other respects I rate the best in its field.

The CPA Certificate . . . *Weighted with Significance*

As we shall observe more fully later, every word of the CPA certificate is weighted with significance. The accountant's report, certificate or opinion (the three words are often, but not always, synonymous) is addressed to the layman, for use by the layman and, in this context, the lawyer is a layman. Its brevity, its form and its language present a deceptive simplicity that may well be disarming and misleading unless read with care and understanding; we shall endeavor to achieve that understanding.

In what follows, the word Institute will refer to the American Institute of Accountants (the national professional society of certified public accountants), and all references to publications will be to those of the Institute unless otherwise indicated.

Definitions stripped to bare bones may, for the moment, serve us best. An audit, in its full sense, is an examination of accounts and related matters intended as a basis for an expression of opinion. An audit properly results in a statement of opinion, not of fact. That opinion is conveyed in a certificate or report (sometimes also called "short form of report"). For "official" definitions, see pages 18 and 19 of *Accounting Terminology Bulletins, Review and Résumé Number 1,* (1953). Those definitions, unfortunately, are of the circular variety, yielding full meaning only if the import of each word is understood.

The opinion thus resulting from the audit may be an unqualified certificate or it may be a qualified certificate–or the auditor may disclaim an opinion. The standard form of certificate is an unqualified certificate; it will be presented ver-

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batim later and discussed in detail; it is the highest form of opinion, affording the best assurance of completeness and reliability. It attests that the accountant is as fully satisfied as one can be of the integrity of the financial statements. If, however, the auditor is not so satisfied, if he finds that he must make reservations and exceptions, he may issue a qualified certificate: thus, a qualified certificate endorses the financial statements as fully as does the unqualified certificate, subject, however, to the stated reservations and exceptions. Here, then, is the reason why the opinion must be read with care: any variation from the standard form of unqualified certificate may signal a qualification, a deduction in some measure from full value. Finally, the exceptions may become so extensive as to negative the formation of an opinion: hence a disclaimer of an opinion on the statements as a whole. This is no more than an attitude of neutrality; it does not mean that the financial statements are not worthy of credit.

To clarify further: A reservation or exception must be studied critically. It is not necessarily unfavorable; indeed, it may herald an improvement in the accounting of the enterprise. It does mean that there is some variation from the generally accepted accounting principles, or auditing standards, or auditing procedures—or merely a shift from one set of accepted principles to another set, equally acceptable, which may, however, have a significant bearing on the results of the precise period under review. It may mean that, for reasons of economy or otherwise, management has imposed limitations on the extent of the audit; obviously, the auditor cannot certify beyond what he has seen or done. Not every report is an audit report, nor is every examination by an accountant an audit. The financial statements may simply be drawn from the books without audit; in that case, the "report" should be so labelled.

One special caution: beware of the accounting report that contains neither an unqualified nor a qualified certificate nor a disclaimer of opinion nor the notation "prepared from the books without audit"; such reports may be very extensive, with an overwhelming volume of figures and other data, and so seem to bear all the indicia of expertness and authority, but actually the accountant has withheld any indication of his own view as to the credibility of the material presented. Unhappily, such reports are still issued, despite the professional requirement that the auditor disclose the extent of the responsibility that he assumes; see page 19 of *Codification of Statements on Auditing Procedure* (1951).

In short, when the lawyer is called upon to use an audit report or an accounting report or a set of financial statements submitted by an accountant, his initial inquiry should be: To what extent has the CPA assumed responsibility for the integrity of the material presented? Otherwise stated, to what extent is the testimony entitled to credence? To that inquiry, and that alone, this essay is addressed.

A Bit of History . . . *Accounting Evolution*

Accounting is in evolution; its concepts and procedures have developed through the years and we may earnestly hope that it will continue to share the advance of modern thought. We shall better understand the present stage of evolution if we take note briefly of whence we came. The accounting profession shares the social responsibility for our economic progress; it is willing and able to bear full responsibility for its appropriate contribution to the nation's economic stability and growth. Yet it should be noted that in our generation the history of the profession demonstrates that its trend has been to circumscribe and limit the measure of responsibility undertaken by the individual accountant or firm. Perhaps this is both necessary and proper in our vast and complex economy; but it is the key to our story, and it underscores the importance of understanding the nature and significance of the accountant's reports.

The story begins in 1917 with a modest pamphlet on "Uniform Accounting" prepared by the Institute at the request of the Federal Trade Commission, endorsed by the Commission, and published in the Federal Reserve Bulletin. In the 1930 decade, the impact of judicial decision, the New York Stock Exchange, the McKesson & Robbins fiasco, and the Securities and Exchange Commission combined to accelerate elaborate self-regulation by the profession. Since 1939 the Institute has issued forty-three Accounting Research Bulletins, twenty-six Statements on Auditing Procedure, a set of Auditing Standards, and a booklet on Audits by Certified Public Accountants. Among the most significant changes has been the shift in emphasis from such representations as "true and correct" to the representation that the financial statements "present fairly" the financial facts; thus the notion of precise mathematical accuracy and complete verification is replaced by the concept of competent and fair presenta-

tion. Some details are presented chronologically in the footnote.[1]

Accounting Utopia . . . *Compliance by CPAs*

Utopia within the profession of accounting would be achieved if there was total compliance with the multiplicity of "pronouncements" by the Institute and Committees of the Institute indicated in the footnote—Utopia, and perhaps also the end of growth. The simple truth is that compliance by the profession is far short of total. This circumstance accentuates the problem of the lawyer to ascertain the extent of the responsibility undertaken by the accountant in any given report, and stresses the need to read with care and understanding.

But it is true, odd though it may seem, that the CPA who issues an unqualified certificate without complying with all the restrictions imposed is actually and knowingly undertaking more, not less, responsibility, at the peril of his purse and his reputation. Why? The rules are designed to limit, not to extend, the responsibility of the accountant.

What are the sanctions for noncompliance? He who violates the Institute's Rules of Professional Conduct is subject to censure, suspension or expulsion. (It is not amiss to recall here that those Rules of Conduct set a standard not less high than the Canons of Ethics of the Bar). But the *Accounting Research Bulletins* (with a vision for growth) declare: "Except in cases in which formal adoption by the Institute membership has been asked and secured, the authority of the bulletins rests upon the general acceptability of opinions so reached [by the Committee] . . . . It is recognized also that any general rules may be subject to exception; it is felt, however, that the burden of justifying departure from accepted procedures must be assumed by those who adopt other treatment." (To the lawyer, this language is reminiscent of the announcements of the American Law Institute in the *Restatement of the Law.*) As to the Codification of the Statements on Auditing Procedure, however, we find no comparable declaration; "it is intended to serve as a guide", says the Committee.

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1. The chronology is as follows:

1917: The Institute prepared a "memorandum on balance-sheet audits", under the name of "Uniform Accounting: a Tentative Proposal Submitted by the Federal Reserve Board."

1918: The 1917 pamphlet was reissued under a new title, "Approved Methods for the Preparation of Balance-Sheet Statements",—the change indicating perhaps a realization that uniform accounting is a Utopian objective.

1929: The pamphlet was again revised by the Institute and again issued under the sponsorship of the Federal Reserve Board. The title was modified to read "Verification of Financial Statements"—thus embracing the income statement or "profit and loss statement" as well as the balance-sheet. The following form of unqualified certificate was suggested for use:

"I have examined the accounts of..... company for the period from ..... to ..... I certify that the accompanying balance sheet and statement of profit and loss, in my opinion, set forth the financial condition of the company at ..... and the results of the operations for the period."

I submit this specimen form by way of contrast with the standard form currently approved, to be presented later. For the moment, note that in the relatively sweet and simple days of 1929, the certificate was virtually all-inclusive.

1931: Judge Cardozo rendered the opinion of the New York Court of Appeals in the *Ultramares* case, 255 N. Y. 170, 174 N.E. 441, 74 A.L.R. 1139. The Court of Appeals ruled that accountants are not liable to third parties for negligence, but granted a new trial on the issue of fraud. The opinion declares that "A mere glance reveals the difference." "Fraud includes the pretense of knowledge when knowledge there is none."

1936: The Institute, under its own sponsorship, published a revision of the three earlier pamphlets, in a Bulletin entitled "Examination of Financial Statements by Independent Public Accountants". Here the word "Examination" replaces "Verification" used in the previous title; it gives effect to the view that "verification is not an accurate portrayal of the independent auditor's function in the examination of financial statements." Within three years, parts of this 1936 Bulletin began to be modified and superseded. The reasons will soon be apparent.

1939: This is the year when the McKesson & Robbins fiasco burst upon the scene. Beginning January 5, 1939, and continuing through April, 1939, the Securities and Exchange Commission conducted hearings, with special reference to the "financial statements and schedules . . . prepared and certified by" a very large accounting firm.

1939: January 30, 1939, the Institute appointed a committee "to examine into auditing procedure and other related questions in the light of recent public discussion." This committee became known as the Committee on Auditing Procedure. Between the years 1939 and 1949, the Committee issued 24 Statements on Auditing Procedure which, in 1951, were assembled into what is now known as Codification of Statements on Auditing Procedure. At about the same time in 1939, another committee, the Committee on Accounting Procedure, was established by the Institute to inquire into accounting principles as distinguished from auditing procedures. This committee has issued Accounting Research Bulletins, 42 in number between 1939 and 1952 which, in 1953, were assembled into Accounting Research Bulletin No. 43 and designated Restatement and Revision of Accounting Research Bulletins. These two sets of "pronouncements", as they are called by the committees, are vital to our theme.

1939: September, 1939: The Institute membership adopted a program for "extended auditing procedures" to include physical inspection of inventories and independent confirmation of receivables. Here, then, are important new limitations: the accountant shall not be required to assume responsibility with respect to the authenticity of the figures as to inventories or as to receivables unless his engagement is broad enough in scope to include physical inspection of inventories and independent confirmation of receivables.

1941 and 1942: In 1941 the Securities and Exchange Commission issued further releases respecting "Accountants' Certificates". In October, 1942, the Institute membership adopted Statement on Auditing Procedure No. 12, making further disclosure mandatory, in these words:

" . . . that hereafter disclosure be required in the short form of independent accountant's report or opinion in all cases in which the extended procedures regarding inventories and receivables set forth in 'Extensions of Auditing Procedure' are not carried out, regardless of whether they are practicable and reasonable, and even though the independent accountant may have satisfied himself by other methods."

1947: The Committee on Auditing Procedure adopted a "Tentative Statement of Auditing Standards—Their Generally Accepted Significance and Scope." In view of what has followed, these standards have acquired basic importance. They include: General Standards, Standards of Field Work, and Standards of Reporting.

1948: In September, 1948, the Institute membership adopted the 1947 Tentative Statement of Auditing Standards. In October, 1948, the Committee on Auditing Procedure issued Statement on Auditing Procedure No. 24, presenting a new "recommended revised short-form of accountant's report or certificate". This 1948 form of certificate (or opinion or report) is currently standard.

1948: The 1936 Institute booklet "Examination of Financial Statements by Independent Public Accountants" was withdrawn from distribution, as obsolete. It has been supplanted by the pamphlets that we have been discussing (the Auditing Standards, the Accounting Research Bulletins, and the Codification of Statements on Auditing Procedure), and by the booklet next to be mentioned.

1950: The Institute issued a booklet entitled "Audits by Certified Public Accountants . . . Their Nature and Significance". This 56-page pamphlet is designed to "help those who are not familiar with the process of auditing gain a better understanding of the Certified Public Accountant's work and his responsibilities." It presents a fairly comprehensive view of accounting procedures, and affords significant aid to the understanding of how to read the CPA's certificate and report. It stresses many of the points made in this article.

1954: The Committee on Auditing Procedure re-issued its 1947 Auditing Standards, omitting from its title the designation "Tentative", and now naming the pamphlet Generally Accepted Auditing Standards. The Institute's Rules of Professional Conduct are by reference incorporated as part of the Standards. A significant addition is made to the Standards of Reporting: the expression of an opinion (unqualified or qualified) or the disclaimer of opinion is expressly required; and this statement is made:

"In all cases where an auditor's name is associated with financial statements the report should contain a clear-cut indication of the character of the auditor's examination, if any, and the degree of responsibility he is taking."

The Unqualified Certificate . . *A Technical Instrument*

Against this background of historical evolution, we are ready for a searching analysis of the nature and significance of the accountant's certificate, or opinion or report. We are prepared to find it a meaningful, carefully constructed and highly technical instrument. It is the measure of the responsibility undertaken by the accountant in any given instance.

The unqualified certificate or opinion, in the form adopted in 1948 and currently standard is, in full text:

> We have examined the balance-sheet of X Company as of December 31, 19– and the related statement (s) of income and surplus for the year then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.
>
> In our opinion, the accompanying balance-sheet and statement (s) of income and surplus present fairly the financial position of X Company at December, 31, 19– and the results of its operations for the year then ended, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

A certificate in this form affords maximum assurance of the integrity of the financial statements, which is to say that it affords all the assurance permitted by the nature of the auditing process. The CPA is not an insurer, and the certificate is not a guaranty. It is subject to all the limitations inherent in auditing and stated or implied in the certificate. What are these limitations?

"We have examined. . . ." An audit is not an absolute verification; the suggestion of verification was abandoned between 1929 and 1936. An audit is an examination conducted in the manner stated farther on in the certificate.

". . . the balance-sheet of X Company as of December 31, 19– and the related statement(s) of income and surplus for the year then ended." These two (sometimes three) statements are what is generally referred to as the financial statements. It is these that have been examined. Note here that these are the statements "of X Company"—the statements of the client, not of the auditor. Even though audited, the representations in the financial statements continue primarily to be representations made by the client, and only secondarily those of the auditor. The client is primarily responsible for the fairness of those statements. The CPA is responsible only for their competent audit.

"Our examination was made in accordance with generally accepted auditing standards. . . ." We deal here not with auditing procedures or with accounting principles (those come later on), but with auditing standards. These are the generally accepted auditing standards described in our historical review as to the years 1954 and 1947. Those are standards of quality performance and are amply high in the normal course of business affairs. But they are also standards of limitation of the auditor's responsibility; if it develops that the audit so conducted is incorrect, the auditor cannot be held to any higher standard.

". . . and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances." Here we have the auditing techniques and procedures, the Codification of Statements on Auditing Procedure bundled into and made a part of the certificate by this simple reference. Thus, the "pronouncements" since 1939 are swept upon the scene. Again, these set standards both of performance and of limitation; they determine the topmost level of the auditor's duty and the topmost level of his responsibility. We do not propose in this essay to discuss auditing techniques, except to demonstrate that they become part of the certificate. The word "tests" in the certificate stresses the fact that the audit of the accounting records is by test and sampling, not by exhaustive review or complete verification. Upon the auditor rests the duty to determine what "auditing procedures" are "necessary in the circumstances".

"In our opinion. . . ." Here we see that the CPA's certificate is the statement of a professional opinion, no more, no less. It is not a pronouncement either of ultimate truth or of mathematical exactitude. It is an opinion based upon the auditor's personal judgment as well as upon facts that he has found. It is an informed judgment, resting upon his training, his experience and his independence of character, guided by generally accepted accounting principles (this last appears later in the certificate). Thus, while we still speak of certificate and of certified financial statements, and of certified reports, the case rests on professional opinion. Even the phrase "We certify that . . ." has been lost in antiquity—somewhere between 1929 and 1936.

". . . the . . . statements . . . present fairly . . ." Once again, seasoned judgment is the keynote. The auditor represents that, having made a careful audit in accordance with approved auditing standards, he has reached the conclusion that in his best judgment the statements present the financial facts fairly. He believes that, for all practical purposes, the statements may be accepted as accurate. It is well to recall that many of the accounting judgments of management and of the accountant rest on accounting principles, not on mathematics. ". . . as applied to accounting practice, the word principle does not connote a rule from which there can be no deviation. An accounting principle is not a principle in the sense that it admits of no conflict with other principles. In many cases the question is which of several partially relevant principles has determining applicability."

". . . in conformity with generally accepted accounting principles . . ." We cannot here explore accounting principles; an introduction to that theme was presented in the ar-

(Continued on page 283)

The Right To Work Revisited:

A Reply to Dean Joseph A. McClain

by **Robert W. Gilbert** · *of the California Bar (Los Angeles)*

In the August, 1956, issue of the Journal, we carried an article by Dean Joseph A. McClain, then of the Duke Law School, commenting on the decision of the Supreme Court in Railway Employes' Department, A. F. of L. v. Hanson, which upheld the constitutionality of the so-called "union shop" amendment of the Railway Labor Act. Dean McClain's article was an analysis of the whole problem of the "union shop" versus the "right to work", and he argued that the decision went a long way toward thrusting upon every employee a compulsory "right" to join a union. Mr. Gilbert answers Dean McClain in this issue, declaring that there is no constitutional right to refrain from joining a union and that the problem of the union shop is within the allowable scope of congressional authority.

In 1949, shortly after the Supreme Court of the United States had rejected efforts of organized labor to identify the right of employers and unions to enter into "union shop" contracts with the "freedom of association" guaranteed by the First and Fifth Amendments,[1] readers of this JOURNAL were exposed to sharply conflicting views in what the editors called "an area where the lack of objectivity is often remarkable".

It was also observed editorially that "The law balances conflicting 'rights' in many fields, but nowhere is there more controversy over the balancing than in the field of labor law where the right to work is now being challenged by the assertion of the unions' right to security."[2]

George A. Rose, an Indianapolis lawyer and former National Labor Relations Board official, urged at that time that there existed a paramount right to work without being required to join a labor organization. In reply, this writer, a Los Angeles lawyer and former National War Labor Board official, insisted with equal conviction that "there is nothing in any decision of the High Court to justify the conclusion of Mr. Rose that a fundamental or constitutional right exists to refrain from joining a union."[3]

On May 21, 1956, the Supreme Court of the United States rendered its unanimous decision in *Railway Employes' Department, A. F. of L.* v. *Hanson*.[4] The Court there upheld the constitutionality of the 1951 "union shop" amendment to the Railway Labor Act of 1926[5] and declared the supremacy of that valid federal enactment[6] over the "right to work" provision of the Nebraska State Constitution prohibiting "union shop" agreements.[7]

1. *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949), and *A.F. of L.* v. *American Sash & Door Co.*, 335 U.S. 538 (1949), upholding state "right to work" laws, of Nebraska and Arizona, against constitutional challenge.

2. Editor's Note to Rose's *The Right to Work: It Must Be Supreme Over Union Security*, 35 A.B.A.J. 110 (February, 1949).

3. Gilbert, *The Right To Work: A Reply to George Rose*, 35 A.B.A.J. 465 (June, 1949).

4. 351 U.S. 225, 76 S.Ct. 714, 100 L. ed. Adv. Rep. 633 (1956).

5. 64 Stat. 1238, 45 U.S.C. §152, comprising Section 2, Eleventh, of the Railway Labor Act as amended. This amendment provides that "Notwithstanding . . . any other statute or law of the United States or Territory thereof or of any state, any carrier . . . and a labor organization . . . duly designated and authorized to represent employees . . . shall be permitted— . . . to make agreements requiring as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreement, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership."

6. *Constitution of the United States, Art. VI; see Local No. 25* v. *New York, New Haven and Hartford Railroad Co.*, 350 U.S. 155 (1956); *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468 (1955); and *Garner* v. *International Brotherhood of Teamsters*, 346 U.S. 485 (1953).

7. Nebraska Constitution, Article 15, §13, as implemented by Neb. Rev. Stat. (1943) §48-217, both providing that "No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization or because of refusal to join or affiliate with a labor organization; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or nonmembership in a labor organization."

One might have thought that the constitutional phase of this recurrent debate between the advocates of so-called "right to work" legislation and the proponents of "union shop" agreements had been settled at last.

Nevertheless, the long-standing constitutional controversy has been raised again by a recent JOURNAL article in which the Dean of Duke University's School of Law vigorously attacked the *Hanson* decision because, in his opinion, it "advanced a new and totally different concept of the right to work".[8]

Actually there is nothing new or unprecedented in the *Hanson* decision. As anticipated by many legal observers, the Supreme Court simply rejected the unsupported claim by advocates of the so-called "right to work" that individual employees in an organized establishment possess an inalienable right to refrain from joining the union even where membership is available to them on equal terms without arbitrary discrimination of any kind.

It has often been necessary to remind protagonists in this controversial field of labor relations that "generalizations are treacherous in the application of large constitutional concepts".[9] The principal cases usually relied upon by the so-called "right to work" advocates, which were cited by Dean McClain as defining the "Fifth Amendment's protection of a right to work in the ordinary occupations of life",[10] are limited to prohibiting arbitrary discrimination in employment by the denial of work opportunities "upon terms of equality with all others in similar circumstances".[11]

Long before the *Hanson* decision was handed down, the Supreme Court upheld the right of labor organizations to engage in peaceful concerted activities directed against competing non-union workers as an exercise of the freedom of speech and assembly guaranteed by the First and Fourteenth Amendments. In so ruling, the Court explicitly declared that the Federal Constitution does not confer upon such non-union workers any right to obtain "a hoped-for job" nor does it prohibit union efforts to divert employment from non-members to members in the course of economic competition for jobs under our system of free enterprise.[12]

Far from being novel, the *Hanson* decision merely reaffirms that "the right to work which the Court has frequently included in the concept of 'liberty' within the meaning of the due process clauses"[13] amounts to freedom from arbitrary and unreasonable classification of persons desiring employment. Of course, concerted efforts by unions, employers or others to deprive employees or prospective employees of equal job opportunities based upon such irrational grounds as race, color, national origin or ancestry will be struck down as constituting arbitrary discrimination abridging basic civil liberties,[14] but traditional "union shop" practices do not fall within this category.

Other cases upholding the right to engage in various occupations and professions relied upon by Dean McClain[15] further illustrate that the doctrine of equal opportunity does not prohibit the establishment of a reasonable system of classification for determining eligibility to pursue a particular trade or calling. The *Hanson* case properly applied this doctrine to sustain a congressional enactment authorizing a limited form of "union shop" in collective bargaining agreements vol-

8. McClain, *The Union Shop Amendment: Compulsory "Freedom" To Join a Union*, 42 A.B.A.J. 723, (August, 1956). The author apparently concedes the correctness of the Supreme Court's decision of the federal preemption issue since he does not discuss this aspect of the *Hanson* case.

9. Frankfurter, J. in *Hughes* v. *Superior Court*, 339 U.S. 460, (1950).

10. *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886), invalidating a San Francisco municipal ordinance which had the effect of arbitrarily barring Chinese aliens from engaging in the laundry business; *Truax* v. *Raich*, 239 U.S. 33 (1915), declaring unconstitutional the application against an alien restaurant worker of an Arizona statute which required employers of more than five workers to hire not less than 80 per cent qualified voters or natural-born citizens; *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410 (1948), voiding a California statute forbidding the issuance of commercial fishing licenses to aliens ineligible for citizenship.

11. Harlan, J. in *Powell* v. *Pennsylvania*, 127 U.S. 678, 684 (1888). Despite the broad pronouncement of the traditional right to pursue an ordinary calling or trade, the Court there upheld a statute restricting the right to engage in the manufacture of oleomargarine because "it does not appear upon the face of the statute or from any of the facts of which the Court must take judicial cognizance, that it infringes rights secured by the fundamental law." (127 U.S. at page 685). See also *Mugler* v. *Kansas*, 123 U.S. 623 (1887), upholding a state law restricting the right to engage in the liquor business.

12. *Senn* v. *Tile Layers' Union*, 301 U.S. 468 (1937); *A.F. of L.* v. *Swing*, 312 U.S. 321 (1941); *Cafeteria Employes' Union* v. *Angelos*, 320 U.S. 293 (1943). Regarding the right of union members to refuse to work with non-union employees, see Rutledge, J., concurring, in the *American Sash & Door Company* case, *supra* note 1.

13. Douglas, J. in the *Hanson* case, *supra* note 4, citing *Truax* v. *Raich* and the *Takahashi* case, both *supra* note 10.

14. *Steele* v. *Louisville & Nashville Railroad*, 323 U.S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive Engineers*, 323 U.S. 210 (1944). See also *James* v. *Marinship Corp.*, 25 Cal. 2d 721, 155 P. 2d 329, 160 A.L.R. 900 1944), and *Hughes* v. *Superior Court*, 32 Calif. 2d 850 (1948), affirmed, 339 U.S. 460 (1950). Dean McClain suggests (42 A.B.A.J. at page 795) that there is no difference, constitutionally speaking, between a statute permitting collective bargaining agreements "restricting employment to members of the white race" and a law authorizing agreements by which employment may be limited to "workers who are required to join or pay their money to a labor union".

15. *Cummings* v. *Missouri*, 4 Wall. 277 (1867), which held invalid the test oath prescribed for office holders, teachers and preachers after the Civil War requiring them to swear that they had not participated in the Rebellion, on the ground that it had no reasonable relation to professional duties or qualifications, but rather was a punishment for past offenses; *Allgeyer* v. *Louisiana*, 165 U.S. 578 (1897), voiding a state statute prohibiting the assured from contracting directly with a marine insurance company outside the state for coverage of property within the state, as an arbitrary restraint upon the liberty of contract; *Smith* v. *Texas*, 233 U.S. 630 (1914), invalidating an act arbitrarily making it a misdemeanor for a person to act as a railway passenger conductor without first having had two years' prior experience as a freight conductor or brakeman; *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), holding that a state law forbidding the teaching in any private denominational, parochial or public school of any modern language, other than English, to any child who had not successfully passed the eighth grade, was an arbitrary and unreasonable interference with the right of a foreign language teacher to teach and of parents to engage him to instruct their children; *Wiemann* v. *Updegraff*, 344 U.S. 183 (1952), which voided an Oklahoma statute arbitrarily requiring a loyalty oath from state college employees negating membership in or affiliation with proscribed organizations without regard to possible lack of knowledge of their nature and purposes at time of membership; *Slochower* v. *Board of Education*, 350 U.S. 551 (1956), which held that application of a New York City municipal charter provision to permit summary discharge *without notice or hearing* of a City college professor, who had invoked the privilege against self-incrimination when questioned about possible membership in subversive organizations, was arbitrary and a denial of procedural due process.

The quoted opinion of Justice Harlan in *Powell* v. *Pennsylvania*, *supra* note 11, and the quoted dissents of Justice Bradley in *Butchers Union Slaughter-House Co.* v. *Crescent City Livestock Co.*, 111 U.S. 746 (1884), and of Justice Douglas in *Barsky* v. *Board of Regents*, 347 U.S. 442, 472 (1956), all laid stress upon the right to work at a lawful business, trade or calling, but in those cases the Court respectively upheld what it found to be reasonable regulation of the manufacturing of oleomargarine, the slaughtering of cattle, and the practice of medicine in what was fairly deemed to be the public interest.

untarily entered into between the private carriers and the labor organizations representing the various crafts and classes of their employees.

Is it so shocking to find that the same tribunal which sustained the statutory obligation of employers to bargain collectively with unions representing their employees against the assertion that such measures abridged "liberty of contract"[16] should uphold the legally-authorized obligation of the beneficiaries of collective bargaining to contribute to its costs against the charge that such authorization abridges the "right to work"? Such legislation has consistently been regarded as a valid exercise of the constitutional power of Congress to regulate labor relations in interstate commerce for the purpose of promoting industrial peace.

While congressional choice of the "union shop" as a stabilizing force in labor relations is thus deemed to be "an allowable one", Justice Douglas carefully explained in the *Hanson* opinion that "there can be no doubt that it is within the police power of a state to prohibit the union or closed shop" in the absence of such conflicting federal legislation.[17]

In the Taft-Hartley Act, adopted in 1947 over a presidential veto, as Justice Douglas noted, Congress expressly authorizes a limited form of union security[18] but "makes the union shop agreement give way before a state law prohibiting it".[19] On the other hand, the 1951 "Union Shop" amendment to the Railway Labor Act "expressly allows those agreements notwithstanding any law 'of any State'."[20]

The Union Shop . . . *An Allowable Policy*

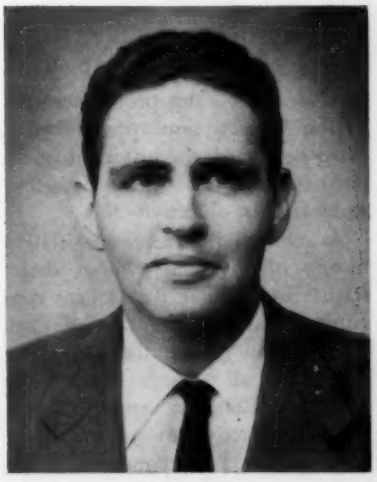
While union critics of the Taft-Hartley Act deplore the "Balkanization" of the national labor policy resulting from Section 14(b) and employer critics of the 1951 "union shop" statute vehemently protest that it unduly interferes with "states' rights", such policy arguments cannot alter the extent of congressional power to make these choices, however unwise others may deem them to be.

As a matter of allowable congressional policy, then, both the Taft-Hartley Act and the amended Railway Labor Act permit collective bargaining agreements which require union membership as a condition of employment so long as such membership is available to non-union workers upon "the same terms and conditions" as are *"generally applicable"* to others. After a reasonable waiting period—thirty days under the Taft-Hartley Act and sixty days under the Railway Labor Act—a non-union employee may be discharged for lack of union membership, unless such membership has been "denied or terminated" for some reason other than his failure to tender the initiation fees and other financial payments (not including fines or penalties) which are *"uniformly required* as a condition of acquiring or retaining membership".

In the face of opposing logic, history and judicial precedent. Dean McClain urges that a statute permitting this type of non-discriminatory "union shop" arrangement when voluntarily entered into between employers and unions is "unreasonable, arbitrary or capricious" and has "no real and substantial relation" to the promotion of industrial peace, so that the legislation necessarily contravenes the "due process" requirements of the Fifth Amendment by depriving non-union workers of their essential "liberty".

As Justice Holmes so eloquently stated more than a half-century ago,[21] the concept of "liberty" embodied in the "due process clauses" of the Federal Constitution "is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law".

The Supreme Court has concluded that *"One would have to be*



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16. *Texas & N. O. R. Co.* v. *Brotherhood of Railway & S. S. Clerks*, 281 U.S. 548 (1930); *Virginia R. Co.* v. *System Federation*, 300 U.S. 515 (1937), and *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

17. Citing the *Lincoln Federal Labor Union* and *American Sash & Door Company* cases, both *supra* note 1.

18. Section 8(a)(3). 61 Stat. 151, 29 U.S.C. §158 (a) (3), which provides that "nothing in this Act, or in any other statute of the United States shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement whichever is the later. . . . *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership."

19. Section 14(b). 61 Stat. 151, 29 U.S.C. §164(b), which provides that "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

20. Section 2, Eleventh, quoted *supra* note 5.

21. Dissenting opinion in *Lochner* v. *New York*, 198 U.S. 45, 76 (1905).

blind to history to assert that trade unionism did not enhance and strengthen the right to work." Dean McClain rejects this pronouncement in the *Hanson* case apparently because he regards the historical works cited in support of that proposition as lacking in objectivity.[23]

As rebuttal, he cites the legislative history of the 1951 "union shop" statute to disprove the Court's conclusion that the intention of Congress was to protect the long-range interests of all workers. Rather, it is suggested, Congress sought "a very limited objective—to put the railroad unions in the same position as respects union shop contracts as the unions covered by the National Labor Relations and Taft-Hartley Acts".

Significantly, no reference is made by the Dean to the legislative history of the 1947 "union shop" provisions of Taft-Hartley which admittedly fashioned the pattern for the 1951 enactment.

In 1947, Congress announced its intention to "abolish what is narrowly termed the 'closed shop'" and "to protect the employee in his job if unreasonably expelled or denied membership", but at the same time made known its desire to permit the "union shop" so as to "give employers and unions who feel that such agreements promoted stability by eliminating 'free riders' the right to continue such arrangements".[24]

The late Senator Robert A. Taft, co-author of the Labor Management Relations Act of 1947, stated during the congressional debates that—

> I have hesitated to support the complete outlawing of the union shop, because the union shop has been in force in many industries for many years and to upset it today would destroy relationships of long standing and probably would bring on more strikes than it would cure.[24]
>
> We considered the arguments very carefully in the committee and I myself came to the conclusion that since there had been for such a long time so many union shops in the United States, since in many trades it was entirely customary, and worked satisfactorily, I at least was not willing to go to the extent of abolishing the possibility of a union shop contract . . .[25]

In the same year that permissible union security was extended to railroad workers and other carrier employees, Republican Senator Taft joined with Democratic Senator Humphrey, of Minnesota, in successfully sponsoring an amendment to the statute bearing the former's name which eliminated the further necessity for "union shop" elections.[26] Congress was aware in 1951 that vast numbers of workers who previously participated in thousands of "union shop" referendum elections under the Taft-Hartley Act had overwhelmingly expressed their specific desire to authorize the labor organizations representing them to make agreements with their employers requiring union membership as a condition of employment.

Dean McClain's arguments are in many instances reminiscent of the earlier contentions of Attorney Rose who insisted that union security "is neither requisite to the purpose of the union and its agency, nor is it a privilege to which the union is entitled on its merits". Such arguments as to the relative wisdom of the alternative policies of allowing or forbidding union security contracts must be addressed to the voters and their elected representatives instead of to the judiciary.

The Electorate . . . *The Final Voice*

Since Justice Frankfurter told the proponents of union security that they must seek vindication by obtaining the endorsement of the electorate, in the *American Sash & Door Company* case seven years ago,[27] one additional state has adopted a so-called "right to work" law (Utah, in February, 1955) and another has repealed its version of the measure (Louisiana, in June, 1956). It was perfectly consistent for Justice Frankfurter to advise the opponents of union security in the *Hanson* case that their main argument "raises questions not of constitutional validity but of policy in a domain of legislation peculiarly open to conflicting views. . . ." The remaining Justices likewise reminded these foes of the "union shop" that Congress "has the final say" and if it disapproves of this legislative policy "the electorate can make a change". The Supreme Court only continued to follow the trend of decision when it unanimously held that the determination of the merits of such issues "rests with the policy makers and not with the judiciary".[28]

Dean McClain invokes the *"clear and present danger"* test in an effort to overcome the usual presumption of validity which supports legislative determinations in the field of policy. He asserts that the individual's alleged right to work without joining a union stems from "freedom of association" which is secured by the First Amendment and there-

(Continued on page 284)

22. In an *ad hominem* criticism, Dean McClain discounts Webb's *History of Trade Unionism* as the work of "an English socialist" and Gregory's *Labor and the Law* as the analysis of "a law professor who was formerly Solicitor for the Department of Labor", characterizing both authors as pro-union "zealots". Perhaps the Dean would have been more favorably impressed if Justice Douglas had quoted from the utterances of a former Republican presidential nominee. Alfred M. Landon, of Kansas, who stated on July 7, 1954, that "Every employer has a right to sign a contract for a union shop if he wants to . . . Yet this so-called 'right to work' legislation would deprive the employer of this right. . . . It is not a question of whether we believe in the union shop or not. The question involved in this legislation is government interference with the independence of both management and labor to negotiate whatever kind of a contract they may agree upon."

23. *Senate Report No. 105*, 80th Cong. 1st Sess. (1947), pages 7 and 20. See also *House Report No. 245*, 80th Cong., 1st Sess. (1947), pages 9 and 34; *House Conference Report No. 510*, 80th Cong., 1st Sess. (1947) pages 41 and 44; *Remarks of Senator Taft*, 93 Cong. Rec. 3952-3953 (1947); *Remarks of Senator Smith of New Jersey*, 93 Cong. Rec. 4412-4413 (1947); *Remarks of Senator Thye*, 93 Cong. Rec. 5087-5091 (1947); *Remarks of Senator Ball*, 93 Cong. Rec. 5147 (1947).

24. 93 Cong. Rec. 3953 (1947).

25. 93 Cong. Rec. 5087 and *ff.* (1947).

26. Public Law 189, 82d Cong., 1st Sess. (1951), 65 Stat. 601.

27. *Supra* note 1.

28. See *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423-425 (1952), upholding a state statute giving employees time off to vote without loss of pay. The majority opinion by Justice Douglas recites that "Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. . . . The judgment of the legislature that time out for voting should cost the employees nothing may be a debatable one. It is indeed conceded by the opposition to be such. But if our recent cases mean anything, they leave debatable issues as respects business, economic and social affairs to legislative decision."

Karl Marx:

The Almost Capitalist

by **Louis O. Kelso** · *of the California Bar (San Francisco)*

▪ **In this analysis of the economic theories of Karl Marx's treatise on "Capital" ["Das Kapital"], Mr. Kelso discovers three basic errors in the reasoning of the intellectual founder of Communism. These three errors, says Mr. Kelso, are among the most fateful in history, for if Marx had clearly seen the flaws in his economic theories, he might well have become the defender of capitalism rather than its enemy, with tremendous consequences for our own century.**

▪ England of the mid-nineteenth century, in the throes of the industrial revolution, was not a pleasant place to work. Anyone who entertains the contrary idea need merely consult the writings of the economists of that period, or its historians, or even its novelists, such as Dickens.

It was against a background of the disintegration of the agricultural economy of England, and the human chaos incident to the industrialization of production that Karl Marx set himself the task of improving the lot of the factory worker.

Beginning slowly during the first seventy-five years of the eighteenth century and reaching a crescendo during the last quarter of that century and the first half of the nineteenth century, incalculable changes took place in the lives of laboring people. The transformation was initiated first by the intensification of the division of labor and later by the crowding of workers into hand or hand-and-machine factories. This phase was, in factory after factory, followed by the mechanization of progressively more of the manual tasks, shifting to animal power, then water power and wind power, and then to steam for basic motive power.

The resulting disorganization in the lives of the people affected was stupendous and frightful. Only the few who were quick to adapt themselves to the era of the machine were able to avoid the destruction—frequently successive destructions—of their means of livelihood through the radical changes resulting from rapid technical obsolescence of the methods of production. The impact of these swift transformations was more than could be safely digested and absorbed by the farm populations which began to turn to the industrial cities for their means of living.

The division and subdivision of tasks once calling for the most highly developed skills until the tasks could be performed in many instances by women and children provided the opportunity, and the indigence entailed in the shifting from an agricultural life to dependence upon the fluctuating employment in factories provided the inducement: thousands of parents exploited their children by forcing them into the factories. Wives neglected their families to become factory employees. The full fury of competition between man and machine, between merchants, between manufacturers and between nations was unleashed among people who had not the faintest idea of its implications. Methods by which producers could become reasonably informed about markets were almost wholly lacking. Laws against adulteration of products had not yet been enacted. Industrial safety codes and means of compensating the dependents of injured workmen were unknown. The sanitary conditions of factories in general were incredibly bad. An employer who worked the men, women and children in his factories only twelve hours a day was something of a public-spirited paternalist. Foreign trade brought the local supplier into competition with foreign producers he had never seen or heard of.

This article is based upon a chapter of Mr. Kelso's forthcoming book, tentatively entitled "Capitalism: The Economics of Freedom".

Newly born industrial enterprises and the people whose fortunes were tied to them, learned the nature of industrial production primarily by successive bitter experiences. Businesses ran through constantly recurring cycles of expansion, boom, overproduction, liquidation and depression. Superimposed upon this disorganizing parade of booms and slumps were the disrupting effects of primitive money and credit systems providing mediums of exchange containing built-in erratic gyrations of their own. The money system of Great Britain, like that of other countries experiencing the industrial revolution, suffered not merely from irresponsible banking, inadequate knowledge, poorly designed regulatory laws and rampant exploitation of the opportunities for financial fraud, but also from the results of heavy importations of gold and silver—the monetary metals—from the New World.

Without analyzing here the causes, we need merely note that the problems of the workers fell upon deaf political ears in Britain and elsewhere as the industrial revolution progressed, until their agonized suffering reached the notoriety of an unsuppressible public scandal. Even then, the factory owners, who could point proudly to the fact that for the first time in history, *per capita* increase in the output of goods and services was beginning to race ahead, had no basis in experience for knowing whether they could at once be humane in their labor relations and still maintain their positions in the unprecedented hurly burly of competition.

Marx's Work . . . *The Cause of Injustice*

Against this background, in which the mere outlines of industrial production under free enterprise were vaguely taking shape, Marx set himself the task of finding the cause of economic injustice. His masterpiece, *Capital,* draws and documents the picture of the industrial revolution from the standpoint of the industrial worker. He was the one primarily responsible for having attached the name "capitalism" to the theretofore unclassified economic system of Great Britain. Marx's source materials, in addition to his own indefatigable personal studies of factory life, were the reports of the Royal Commissioners on the Employment of Children and Young Persons in Trades and Manufacturers, the Reports of the Inspectors of Factories (who were appointed under the Factories Regulation Acts of 1859), the Reports from the Poor Law Inspectors on the Wages of Agricultural Labourers, the Reports of the Select Committee (of the House of Commons) on the Adulteration of Food, and other official documents, as well as the writings of the economists of his day.

Because of the dire suffering of the industrial workers, Marx, who knew the facts and knew how to describe them, made a powerful emotional case for economic reforms to improve the lot of the worker. Since the actual operation of the system, which he called "capitalistic" was as enormously beneficial to the segment—less than 10 per cent—of the population who owned the factories as it was destructively detrimental to most of the 90 per cent who worked in them, Marx could have led a revolt against the established order by pointing to this disparity alone. But he did not choose to do so. He made the most painstaking and ponderous effort to seek out the cause of the injustice.

At length, Marx rendered his verdict. The malefactor, the cause of all this limitless human misery, was the capitalist. His crime, felonious by all canons of human decency and fairness, was the unrecompensed piracy from the defenseless industrial workers of most of the wealth which *they alone* created. No plunder in history, said Marx, could compare with the enormity of the offense of the capitalist who, without working himself, appropriated the products of the worker, leaving the worker with only the minimum amount paid as "slave-wages" to keep him alive and to enable him to produce.

Marx and Capitalism . . . *They Almost Meet in the Dark*

The root of all of the evil Marx surveyed was, he concluded, the private ownership of the means of production. The emotional case which he built in favor of a revolution to improve the position of the industrial worker was mountainous. The method of carrying out the revolution, he advocated, was for the workers to seize the government by force and then to use the state to expropriate the ownership of capital. Unfortunately, the moral truth of the massive case which Marx marshaled for improvement of the lot of the industrial worker was dwarfed by the magnitude of his error in assigning as the cause of the maldistribution of wealth, *the private ownership of capital.*

In the course of his investigation, Marx actually saw, but was prevented by this error from comprehending, the underlying principles of capitalism. Since there can be no doubt about Marx's honest effort and fierce desire to find the key to a workable industrial economy, we are justified in venturing the speculation that had Marx understood the implications of the principles of capitalistic distribution which presented themselves to him as "appearances" only, *he might have become a revolutionary capitalist* instead of a revolutionary socialist.

Karl Marx, as he reflected upon the causes of economic injustice in the first century of capitalism, came to a conclusion as momentous as it was mistaken. The world was to suffer as much from the critical error of the decision as it had suffered to provoke Marx to make it. Had he not been blinded by a borrowed myth, Marx might well have proclaimed "People of the world, unite! Extend the benefits of capitalism to all mankind." Instead, he exhorted the workers of the world to unite and "throw off the chains" of capitalism.

Had Marx chosen the capitalistic

alternative rather than the socialistic one, the world would be a vastly different place in which to live today. Without the false and seductive promises of socialism, Russia, the nation built on Marxism, would be without the principal rhetorical weapon which it uses to seduce the minds of men.

Yet it is a fact that Marx actually considered the problems which should have led him to discover capitalism. But for three basic errors in reasoning, Marx might have been looked upon today as the apostle of capitalism rather than its detractor and tormentor.

The three mistakes that turned Marx away from capitalism rather than towards it, have made Marx the false prophet of the industrial worker. Together with the socialist writers who have followed in his footsteps, Marx deprived generations of workers from realizing that in capitalism—not in socialism—lies their hope for economic well-being, the good life, and political freedom.

Three Mistakes . . . *The Course of History Changes*

The three errors which Marx made were these:

(1) His adoption of the labor theory of value which had previously been advanced by David Ricardo.

(2) His failure to understand that the private ownership of property, including capital instruments, is indispensable to political freedom; in short, his failure to understand the menace to human freedom of the ownership of the means of production by the state.

(3) His mistaking the wealth produced *by capital* for "surplus value", *i.e.*, value which he thought was created by labor and stolen from the laborer by the capitalist.

Let us examine each of these mistakes. In the course of doing this, we shall see in each case how closely Marx came to acknowledging the actual principles of capitalism. Yet in every case, having grasped the principles, he also rejected them because of his fundamental errors.

Error No. 1: The Labor Theory of Value.

Except for the few wants which man can satisfy directly by things adequately supplied by nature, human labor, for untold ages, had been the primary source of the creation of wealth. Man, with his hands and his brain, has given value to raw materials found in nature by imparting to them qualities which render them able to satisfy his wants. Similarly, man has performed personal services for himself or for others which have also satisfied needs. Nothing is more obvious than that man must wrest his living from nature through the cleverness of his mind, the strength of his muscles and the skill of his body. Since, at the outset, then, man was the only acting force, the idea that all changes in nature's raw materials were wrought by man alone was both obvious and indisputable. The labor theory of value —the idea that labor is the only agency capable of creating wealth, *i.e.*, adding "value" to raw materials and performing services—must have been approximately correct in primitive times and, to a lesser degree, in pre-industrial economies.

But once men applied their intelligence to constructing tools and machines which were able to produce wealth, or at least to co-operate with human labor in the production of wealth, a basic change occurred, the significance of which was not at once fully appreciated. The fact that all economic value was not created by labor, but rather by labor and capital together, was obscured by the fact that, in the early stages of machine production, machines were usually "operated" by their owners. As a result, the services of the machine were indistinguishably commingled with those of the machine-owner and so there was yet no occasion for recognizing the separate economic functions of each.

The significance of the labor theory of value is more than academic. *If labor is the source of all value created in the productive process, then labor has a valid moral claim to all wealth created through production.* Then the only moral claim of the owner of capital is to have his capital restored to him, *i.e.*, to get back the value of his capital with compensation for the effects of wear, tear and obsolescence. Honestly to reach his conclusion that the capitalist was thieving from the laborer, Marx had only to believe that labor did in fact create *all* economic value (*i.e.*, the values added to raw materials found in nature).

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But confronted with the fact that capital instruments were actually performing more and more of the functions which added value to raw materials and were even beginning to compete with labor in the performance of purely service activities, Marx could not *prove* the proposition that labor was the sole creator of value and *he did not try.* He merely asserted, again and again, that the proposition was *historically true* and that its truth was of very recent discovery. All commodities, including capital instruments, said Marx, "are only definite masses of congealed labour time" (*Capital,* Modern Library Edition, page 46, New York.)

"The recent scientific discovery that the products of labour, so far as they are values, are but material expressions of the human labour

spent in their production, marks, indeed, an epoch in the history of the development of the human race, but by no means dissipates the mist *through which the social character of labour appears to us to be an objective character of the products themselves." (Ibid.* page 85; italics added). Marx is here saying flatly what he elsewhere elaborates—that although capital instruments *appear* to create wealth, this is merely an illusion, and that there is some sort of mysterious "congealed labor" hidden in the capital instrument which enables it to give value to its products.

At this point Marx actually saw one of the basic principles of capitalism: *that capital instruments do create wealth, just as labor does.* But he rejected the idea as an "appearance" only and held doggedly to his belief that only labor *could* create wealth. By denying the obvious, that in an ever-increasing number of instances, the performance of particular production tasks may be carried out alternatively either by labor or capital instruments; and by asserting that regardless which method was used, the capital instruments owned by a "capitalist", were in fact, "labour instruments"; and by concluding that whichever method was used, labor in fact created all the value, Marx put the capitalist in the unethical role of getting something for nothing.

Today we are not merely familiar with the phenomenon of machines to make machines, we are also acquainted with the trend to make automated machines with automated machines. Nevertheless, tracing the process backwards through several technological generations sooner or later brings one to the point where the predecessor of a particular machine was made by hand labor. Since Marx regarded human labor not only as an ingredient in an economic product, but as the *only* ingredient other than raw materials provided by nature, the problem of machines made largely by machines was a disconcerting one for him.

The value of a product, he said, is determined by the amount of labor time it contains. After a few technological generations of producing machines primarily by machines, what could be said of the machine which, although it contained almost no "value" in terms of man-hours and required very little assistance from labor in the form of an operator's man-hours, turned out a vast quantity of products, all of which sold for very good prices?

Marx actually considered this problem. How could he square the labor theory of value with a machine containing very little "value" (in terms of man-hours of labor) which at the same time is operated with very few man-hours of labor, yet which produces a great amount of wealth? Confronted with this problem, Marx might have announced another of the basic principles of capitalism: that the productiveness, the "productivity", of capital instruments, *in comparison with that of labor* (other than the top echelon of labor consisting of management and technical workers) *is steadily rising.* But here again Marx rejected the clearly discernible truth and supplanted it with a corollary to the labor theory of value.

In this case, he said, the machine, after yielding up what little "value" it contains, *works gratuitously,* just as the sun works ripening the corn in the field. Marx here came within a hair's breadth of recognizing the increasing productivity of capital instruments in comparison with that of labor. Had he allowed himself to see the point, it is safe to assume that a man of Marx's sincerity would have cried, "If capital instruments are the source of the increasing production of wealth in an industrial economy, the owners of capital instruments are rightly the persons who should receive the proceeds of the wealth so produced. Let us then set as our goal the greatest possible accumulation and perfection of capital instruments for the greater production of wealth. And let us so regulate our economy as to extend the opportunity of engaging in production *through the ownership of capital instruments* to an ever increasing proportion of the population."

Marx missed this critical point. Faced with the spectacle of the production of vast wealth through a large contributory effort by capital instruments and a negligible contribution by labor, Marx could merely say: "In modern industry man succeeded for the first time in making the product of his past labour work on a large scale *gratuitously, like the forces of nature." (Ibid.* page 424) Thus did Marx substitute for objective analysis the dogma he had borrowed from Ricardo.

Error No. 2: Marx's Failure To Understand the Political Significance of Property.

Before examining Marx's second critical error, it may be helpful to take note of what the concept "property" means in law and economics. It is an aggregate of the rights, powers and privileges, recognized by the laws of the nation, which an individual may possess with respect to various objects. Property is not the object owned, but the sum total of the "rights" which an individual may "own" in such an object. These in general include the rights of (1) possessing, (2) excluding others, (3) disposing or transferring, (4) using, (5) enjoying the fruits, profits, product or increase, and (6) of destroying or injuring, if the owner so desires. In a civilized society, these rights are only as effective as the laws which provide for their enforcement. The English common law, adopted into the fabric of American law, recognizes that the rights of property are subject to the limitations that (1) things owned may not be so used as to injure others or the property of others, and (2) that they may not be used in ways contrary to the general welfare of the people as a whole. From this definition of private property, a purely functional and practical understanding of the nature of property becomes clear.

(*Continued on page 275*)

Activities of Sections

SECTION OF ANTITRUST LAW

▪ On April 5, the Antitrust Section will hold its fifth annual spring meeting at the Statler Hotel in Washington, D. C.

Preceded by a reception and dinner on Thursday, April 4, the all-day symposium on Friday, April 5, will cover the following subjects:

1. *How To Defend an Antitrust Case,* by Edward R. Johnston, of the Chicago Bar;

2. *The Development of the Rule of Reason,* by Milton Handler, of the New York Bar and Professor of Law at Columbia University;

3. *The Future Role of the Federal Trade Commission in Antitrust Administration,*

(a) *Analysis of Present Problems and Suggestions for Administrative Changes,* by Edward F. Howrey, of the Washington, D.C., Bar, former Chairman of the Federal Trade Commission;

(b) *Should the Judicial Functions of the Federal Trade Commission Be Transferred to an Administrative or Specialized Court?,* Affirmative: Herbert W. Clark, of the San Francisco, California, Bar; Negative: Earl W. Kintner, General Counsel, Federal Trade Commission;

(c) *Panel Discussion of Federal Trade Commission Problems Raised by Preceding Speakers,* Moderator: Robert W. Austin, of the New York Bar, Professor, Harvard Business School, Boston, Massachusetts.

At the dinner on April 4, Assistant Attorney General Victor R. Hansen, Chief of the Antitrust Division, Department of Justice, will act as toastmaster. The cocktail and social gathering which will precede the dinner has always proved a highlight of the meeting from the standpoint of opportunity presented to visit informally with colleagues and with numerous important Government officials who always attend.

The Friday meeting is open to lawyers generally and to the public. Members of the American Bar Association who wish to attend the dinner on April 4 may do so by sending their check for $10.00 per person, payable to the "American Bar Association" to Thomas E. Sunderland, Chairman, Section of Antitrust Law, 1108 16th Street, N.W., Washington 6, D. C.

SECTION OF CORPORATION, BANKING AND BUSINESS LAW

▪ Efforts are being made in the Section of Corporation, Banking and Business Law to encourage a greater proportion of the members to participate more actively in the work to be done. Timely and well-written articles of interest to our segment of the profession are being solicited for publication in *The Business Lawyer.* The task undertaken in recent years of improving the quality and usefulness of our quarterly periodical is being continued with renewed vigor and enthusiasm. The chairman of each of our various committees will cause to be prepared for publication in the July issue of *The Business Lawyer* a comprehensive survey of developments during the year in his committee's field of interest. This annual survey should prove to be of real value to our membership.

The Committee on National Banks has received from the United States Senate Committee on Banking and Currency a print bill entitled "Financial Institutions Act of 1957" together with a brief section-by-section analysis of the bill. Copies are being made available to members of our National Banks Committee for intensive study, and a report thereon should be forthcoming.

The Committee on State Banks has been engaged in analyzing proposed federal legislation concerning bank mergers and the anti-trust statutes. Its efforts are being co-ordinated with those of the Section of Antitrust Law and our Committee on National Banks. Although a proposed resolution on the subject may not crystalize in time for presentation to the House of Delegates at the Midwinter Meeting, this work is actively proceeding.

The Board of Governors of the American Bar Association, by mail vote, gave the Committee on Federal Regulation of Securities authority to oppose, on behalf of the Association, two proposals of the Securities and Exchange Commission. Pursuant to such authority, our position on the first proposal was presented by John Mulford, of Philadelphia, at a public hearing before the commission on January 17, 1957. The first proposal, dealt with in Securities Act Release 3672, specifies common situations in which the commission denies acceleration of the effective date of registration statements. The committee's contentions, as presented by Mr. Mulford, were that (1) a refusal by the commission to accelerate is tantamount to prohibiting a public offering; (2) the sole purpose of the Securities Act is to require full and truthful disclosure; (3) the commission's proposed practice is to deny acceleration regardless of full disclosure for reasons having solely to do with the merits of the security or offering; (4) this practice of the commission is contrary to legislative history, to Securities Act Release Numbers 1 and 3115, and to Section 23 of the Act; and (5) the commission's practice should be reversed.

The second proposal to which the Association, through the Section's Committee on Federal Regulation of Securities, is opposed, relates to a revision of Rule 133 proposed in Securities Act Release 3698.

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Signed Articles
As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

■ *To Even the Scales*

It is the glory of the common law that government itself is subject to law. Without someone willing to go to law with the government, though, that ringing declaration would be as empty as the fair words of the Soviet constitution. Down through the years the nations where the common law prevailed have been fortunate in the number of intransigent individualists who were willing to devote their strength and their wealth to the defense of what they considered the rights of the freeman. A dogged Hampden has generally stood ready to fight the Ship Money and earn the gratitude and admiration of his fellows. Now, however, adjustment is the virtue. We nicely balance the wear and tear of resistance as against the wear and tear of submitting to the unjust exaction. A wrong too slightly felt by any individual to prick him into action becomes universal. In his article in this issue, "A Proposal for a People's Advocate", Abraham L. Freedman makes the interesting suggestion that a fully equipped law office be instituted for the purpose of taking a partisan position where questions important to the public need to be decided. It is fascinating to contemplate the picture of two such establishments, each backed by the funds of one of the wealthy foundations, giving to the respective sides of some public controversy all of the skill, research and determination that characterize the great controversies where vast sums are at stake.

On the other hand, the thought of the inestimable advantage of a war chest and able counsel being thrown into the scales on one side of a controversy makes one wonder whether such power should be entrusted to anyone below the grade of archangel. The ugly word "maintenance" appears out of the cobwebs of the lumber room of the reader's mind.

Nevertheless with so much power inevitably gravitating into the hands of the government it behooves us to weigh carefully every suggestion that points a way to give strength and independence to a loyal opposition.

■ *Brilliant Leadership*

Most of us lawyers think of the Supreme Court as a court of law; that is, a court deciding cases usually involving questions of substantive law under the Constitution. In some ways less conspicuous but more far-reaching in effect, is the work the Court has done in the last twenty years in procedural reform in both the civil and criminal fields of law. The Supreme Court in this respect has had a profound influence, not only on federal practice, but on the states as well. An interesting résumé of this recent history is presented to you in this issue by Judge Alexander Holtzoff, United States District Judge for the District of Columbia.

The American Bar Association itself can take just pride in its part in the vast improvement which has been accomplished by the Federal Rules of Civil and Criminal Procedure. Judge Holtzoff calls this "the most significant reform and the most far-reaching advance in Anglo-American jurisprudence during the past fifty years". And so it is. Far-sighted American lawyers secured the necessary legislation from Congress to empower the Supreme Court to take the role of leader in effecting these timely and necessary reforms. Chief Justice Hughes, Edgar B. Tolman, Circuit Judge Charles E. Clark, Chief Justice Vanderbilt of New Jersey, Chief Justice Stone, and many other members of the American Bar Association figured prominently in this great work. America owes them a great debt.

The fact is that the Federal Rules of Civil and of Criminal Procedure have become the model by which the quality of state procedural rules is judged. Their influence will continue to pervade and affect state law. The day of *Jarndyce* v. *Jarndyce* is long past. Far-sighted conservatism on the part of us lawyers admonishes us to protect our own future by modernizing the system of justice we offer Americans. When justice is delayed, not only is justice denied, but for lawyers a disastrous result follows. Businessmen and other clients take their legal business to arbitrators, to umpires or to

compensation boards to settle their disputes quickly. Horse-and-buggy courts will not last long in a jet age!

Hats off to the brilliant leadership of the Supreme Court in the field of procedural reform! Read Judge Holtzoff's article—and ponder the situation in *your own* state.

■ *Legal Education for Life*

In this issue the JOURNAL brings to its readers a discussion by Chief Justice Vanderbilt, "The Future of Legal Education: We Must Face the Realities of Modern Life". The author discusses the subject from a background of forty-three years in the courts and thirty-four in law teaching. He brings to it the thinking of an expert legal educator and dean, broadened by a statesman's understanding of its significance to the law in relation to human life as a whole. Probably no man living is better equipped to do this, and the article is worthy of its author.

Much recent discussion of legal education, both in our columns and elsewhere, has been narrowly partisan in its approach. Practitioners have criticized the law schools. The teachers of law have defended themselves either by denial of the criticisms or by confession and avoidance. Much heat and but little light have resulted. This article, however, has the impartiality of the great judge who wrote it.

Space does not permit us even to enumerate, let alone comment upon, the many phases of the subject and relevant matters touched on in the article. But all have significance and interest, not only for legal educators but also for the Bar generally.

Chief Justice Vanderbilt's discussion combines insight and vision with practicality. In it both practitioners and teachers may find much to agree with. But whether in agreement or not, one should participate in further discussion of the subject only after first carefully reading and seriously considering this exceptional contribution to thought on a subject of vital concern to the profession.

Nominating Petitions

Arizona

■ The undersigned hereby nominate Walter E. Craig, of Phoenix, for the office of State Delegate for and from Arizona to be elected in 1957 for a three-year term beginning at the adjournment of the 1957 Annual Meeting:

George Read Carlock, Walter Linton, Ross D. Blakley, John Devens Gust, Henry W. Allen, Philip E. von Ammon, Louis McClennen, Kent A. Blake, J. Early Craig, John H. Killingsworth, Anthony T. Deddens, Jarrill F. Kaplan and Elias M. Romley, of Phoenix;

Ivan R. Hawkins, Richard H. Chambers, Henry R. Merchant, Jr., Charles H. Woods, J. Byron McCormick, Lawrence P. D'Antonio, Richard G. Darrow, Clarence E. Houston, Gerald Jones, C. M. Wright, Norval W. Jasper and John K. Mesch, of Tucson.

Iowa

■ The undersigned hereby nominate Ingalls Swisher, of Iowa City, for the office of State Delegate for and from Iowa to be elected in 1957 for a three-year term beginning at the adjournment of the 1957 Annual Meeting:

Bryce M. Fisher, John D. Randall, Merle D. Fishel, Willis A. Glassgow, Clinton E. Shaeffer, Adam A. Kreuter, David M. Elderkin, E. H. Wadsworth, Eldon L. Colton, R. M. Fassler, Carl Hendrickson, J. J. Locher, Jr., Wliliam W. Crissman, George J. Novak and Donald T. Hines, of Cedar Rapids;

Eugene Wright, E. Marshall Thomas, John Oberhausen and Robert Kenline, of Dubuque;

Emil G. Trott, William V. Phelan, William R. Hart, Lloyd A. Epley, Robert Osmundson and D. C. Nolan, of Iowa City.

Mississippi

■ The undersigned hereby nominate John C. Satterfield, of Jackson, for the office of State Delegate for and from Mississippi, to be elected in 1957 for a three-year term, beginning at the adjournment of the 1957 Annual Meeting:

Rae Bryant, Bidwell Adam and Eaton A. Lang, Jr., of Gulfport;

Garner W. Green, George P. Hewes III, Ralph Landrum, Julius T. Reynolds, Jr., Clifford C. Chittim, Reynolds Cheney and Joshua Green, of Jackson;

David C. Welch, Kalford C. Ratcliff, C. Denton Gibbes, Jr., Ernest W. Graves, Goode Montgomery, Jr., and Sam V. Pack, of Laurel;

Thomas D. Bourdeaux, G. M. Ethridge, Jr., and David Williams, of Meridian;

Billy H. Quin, Frank E. Everett, Jr., A. J. Brunini, Burkett Hill Martin, J. Stanford Terry and Landman Teller, of Vicksburg.

Montana

■ The undersigned hereby nominate Edward C. Alexander, of Great Falls, for the office of State Delegate for and from Montana to be elected in 1957 for a three-year term beginning at the adjournment of the 1957 Annual Meeting:

Weymouth D. Symmes, of Billings;

William M. G. Baucus, Clarke M. Dawson, Alex Blewett, Jr., R. F. Clary, Jr., William F. Browning, R. K. West, John H. Weaver, John D. Stephenson, H. Cleveland Hall, William L. Baillie, Oren R. Cure and Leo C. Graybill, of Great Falls;

Oscar C. Hauge, Fred J. Weber,

(Continued on page 274)

The Law's Delay:

Report of the Attorney General's Conference

■ The following is the Report of the Initial Meeting of the Executive Committee of the Attorney General's Conference on Court Congestion and Delay in Litigation, released January 7. It is published here in full.

Introduction

■ In May, 1956, there was convened, on the invitation of Attorney General Herbert Brownell, Jr., a Conference on Court Congestion and Delay in Litigation composed of the presidents of the bar associations of the states and larger cities and the heads of other Bar, judicial and research organizations. His purpose in calling the Conference was to enlist the assistance and to co-ordinate the activities of the many state and federal organizations which heretofore have been working independently on this problem. It was to institute a nationwide program to eliminate delays in litigation without sacrificing any of our procedural and substantive safeguards which are essential to our system of justice. This the Attorney General correctly described as "the most vital problem confronting the bench and bar of our country today".

The Conference unanimously agreed that it should be established on a continuing basis and authorized the appointment of an Executive Committee to further its work. The Committee is composed of the following officials:

Chairman, William P. Rogers, *Deputy Attorney General, representing the Department of Justice;* Judge John Biggs, Jr., *Chairman of the Committee on Judicial Administration of the Judicial Conference of the United States;* Congressman Emanuel Celler, *Chairman of the Judiciary Committee of the House of Representatives;* Senator James O. Eastland, *Chairman of the Judiciary Committee of the Senate;* Judge Edmund W. Flynn, *Chairman of the Conference of Chief Justices;* Jenkins Lloyd Jones, *President of the American Society of Newspaper Editors;* Governor Thomas B. Stanley, *President of the Council of State Governments;* Arthur Littleton, *Chairman of the National Conference of Bar Presidents;* David F. Maxwell, *President of the American Bar Association;* Professor Philip Mechem, *President of the Association of American Law Schools;* Judge Arthur T. Vanderbilt, *President of the Institute of Judicial Administration.*

At the request of the Chairman, the Executive Committee recently met to consider the current situation and to propose methods and procedures by which an effective nationwide attack on court congestion and delay can best be co-ordinated and put into motion.

The following conclusions and recommendations reached at the meeting represent the general consensus of opinion of the Committee and do not necessarily reflect the views of any particular member as to each and every point covered.

Conclusions

The Executive Committee, on the basis of reports submitted and facts considered, reached the following conclusions:

1. The inordinate lapse of time between the institution of suits and their final disposition in many of our state and federal courts constitutes a threat to the effective administration of justice in this country. Excessive delay may result in the denial of reparation for wrongs. It may force parties into unjust settlements. It involves the risk that some witnesses may die or become otherwise unavailable and the virtual certainty that the memories of others will become dim before legal rights which are dependent upon their testimony can be resolved. Prolonged and unjustified delay is the major weakness of our judicial systems today.

2. Unless effective action is undertaken to remedy this serious situation, it may further deteriorate and result in bringing the administration of justice in this country into disrepute.

3. Generations of lawyers and judges have permitted delay in litigation to become chronic, and it is their professional responsibility to take the lead in correcting this shortcoming. The apathy toward the problem is caused in part by a lack of public information and interest. The public, with the excep-

tion of those who have had to seek recourse in the courts, is not fully aware that justice is often unnecessarily slow. It does not know that the administrative machinery of most of our courts is not geared to keep pace with the tempo of our times. In many instances, there is no reliable statistical information available to determine precisely how long it takes to get cases tried. But neither the integrity nor independence of the courts would suffer by public discussion of their administrative shortcomings. On the contrary, public discussion and public interest will stimulate action which will result in improving the administration of justice.

4. Because of the widespread attitude of resignation to the law's delay, the solution to the problem will require an extraordinary, nationwide drive. We are convinced, however, that given adequate judicial manpower and proper judicial administration, this concerted drive can eliminate the existing congestion of cases on the calendars of our courts without subverting fundamental principles of justice. Once this backlog of pending cases is eliminated, and lawyers, judges and litigants are shown that delay is not inevitable in our judicial systems, the business of the courts can then be kept current even though litigation will undoubtedly increase as our economy and population continue to grow.

Recommendations

The Committee considered a great many worthwhile proposals which have been recommended and successfully employed as methods whereby in an orderly, effective and impartial way the administration of justice in our courts can be placed on the current basis. It was determined that for the present its recommendations would be limited to those proposals which will have an immediate and direct impact on the serious congestion and delay which now exists. It has, therefore, reserved, for further consideration and future recommendation, a number of proposals which may prevent recurrence of undue delay. The initial steps of the operation plan to be actively co-ordinated by the Committee are confined to the matters that are deemed to be basic requirements.

I. With particular regard to the state courts, we recommend the immediate initiation of action programs by all participating organizations in the Attorney General's Conference on Court Congestion and Delay, within their particular sphere of competence, with the following objectives:

(a) The establishment of centralized administrative supervision of all courts in a single head, preferably the chief judge of a state system, with authority to promulgate uniform court rules and to assign judges to places where congestion is acute and thereby assure fair division of work among all available judges. This administrative supervision requires the assistance, in every state, of an effective Administrative Office of the Courts or an equivalent administrative staff to provide the necessary management and administrative services for the courts.

(b) The maintenance in all jurisdictions of uniform and up-to-date judicial statistics. Information should be compiled on the time required from the filing of cases until their final disposition on how long cases are held after submission until decision and on how long it takes on the average to have a case decided on appeal. Such statistics should preferably be maintained by the administrative office or staff designated for that purpose.

(c) The adoption of modernized rules of procedure to keep abreast of modern conditions, providing particularly for effective utilization of pretrial conferences and discovery procedures to promote the orderly and expeditious trial of cases.

(d) The adoption of businesslike methods for supervising court calendars that will result in more efficient use of the time of judges and to give full recognition to the responsibility of judges to control the progress of litigation from the time cases are commenced until their final disposition.

(e) Frequent conferences of members of the Bar and judges, formally and informally, to encourage cooperation in efficient judicial administration and improvement through self-criticism, evaluation and interchange of views.

II. The Attorney General's Conference can also have great impact on this nationwide problem by stimulating action which will result in bringing the federal court system up to date. It is anticipated that a favorable precedent set by the federal courts in eliminating court delays will encourage state courts to follow suit. Therefore, in addition to recommending the adoption of the above proposals in all jurisdictions where they have not been adopted, the following specific recommendations are made concerning the federal courts:

(a) We recommend legislation to provide that a chief judge of a federal circuit or of a federal district court shall relinquish his administrative duties upon reaching the age of 70. This proposal gives recognition to the established fact that the daily administrative problems of the courts are difficult and exhausting and that senior judges should not be called upon to handle them in addition to normal duties.

(b) We recommend that Congress invite the Chief Justice of the United States to appear personally before a joint session at the beginning of every Congress and report on behalf of the Judicial Conference of the United States on pending urgent requirements of the federal courts and on long-range programs to meet future needs before they become critical. It is essential that the courts be provided with a spokesman to make known to Congress directly and effectively recommendations which will advance the proper administration of justice and which are therefore of common concern.

(c) We recommend enactment by Congress of legislation to effectuate the recommendation of the Judicial Conference of the United States for the creation of thirty-five additional federal district judgeships, two additional circuit judgeships, and making permanent the four temporary judgeships. These additional federal judgeships are critically needed, not only to assist in the current drive to eliminate congestion and delay but to fill the need for more judges to handle the ever-expanding business of the courts caused by the continuing growth of our population and expansion of our economy.

(d) We recommend amendment of Section 371 (b) of Title 28, United States Code, to designate a judge who

takes advantage of the retirement provisions a "senior judge" rather than a "retired judge", and to provide a "Roster of Senior Judges" who are willing and able to undertake special judicial duties upon assignment by the Chief Justice. This would mitigate the present feeling of many judges that by retiring they mark themselves as useless and no longer fit for public service even on a limited basis. It would create a status whereby mature, experienced and respected senior judges may serve with distinction and perform important public service in their judicial capacity.

(e) We recommend, in concurrence with a resolution of the Judicial Conference of the United States, that pretrial procedures and techniques should be used in every civil case in the federal courts except in extraordinary cases where the district judge expressly enters an order otherwise and finds that the ends of justice would be better served without resort to these procedures. While we recognize the early reluctance on the part of many judges to employ novel procedures before their effectiveness had been fully tested, the salutary experience with pretrial now justifies its adoption by all district courts as a recognized means for providing better and more expeditious trial of cases.

III. The following recommendations are of general applicability:

(a) We recommend that law schools adopt as a part of their regular curriculum instruction in the administrative aspects of the law. Such a course should include the teaching of methods for reducing delays in litigation and that the use of dilatory tactics is contrary to the ethical standards governing the practice of law and the professional responsibility of officers of the court. Bar associations should initiate similar programs to stimulate in their membership action consistent with these principles.

(b) We recommend as a guide in determining whether trial court calendars are current that delay in the final disposition of the average civil case beyond six months after the action is commenced should be considered excessive. If an appeal is taken, the case should be brought on for argument and a decision rendered within six months after entry of the judgment appealed from.

(c) Finally, we recommend that all possible means be utilized to focus public attention on both the accomplishments and shortcomings of our judicial systems. It is essential, if corrective action is to be forthcoming, that there be public knowledge and awareness of the serious deprivations of justice which result from undue delays in the administration of justice. This is currently lacking. All media of public information, therefore, should be provided with and encouraged to disseminate accurate and specific factual material on the condition of the courts. We must rally public support behind this nationwide drive against the law's delay for the measures which will result in its elimination.

Recently, Mr. Justice Brennan spoke on the need for improving the administration of justice in this country. He succinctly expressed why it is so essential that this nationwide drive to bring justice up to date in all of our courts must succeed and why we are confident that it will. He said:

> Let us not forget that the integrity and efficiency of the judicial process is the first essential in a democratic society. The confidence of the people in the administration of justice is a prime requisite for free representative government. The public entrusts the legal profession with the sacred mission of dealing with the vital affairs that affect the whole pattern of human relations.
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> These are not only times which have produced a monstrous threat to all freedom, but, by the very reason of that threat, are times which have induced in free peoples everywhere an ever intensifying critical self-examination of the institutions upon which their freedoms depend—an insistence upon exposure of the imperfections of those institutions, a peremptory demand upon those who are entrusted with those institutions to improve and strengthen them the more surely to withstand the onslaught bent upon their destruction.

Respectfully submitted.

WILLIAM P. ROGERS, *Chairman*

January 7, 1957

Activities of Sections

(Continued from page 239)

This proposal would reverse the present practice whereby solicitations of stockholders' votes for substantially all mergers, consolidations, reclassifications of securities and transfers of assets between corporations are exempt from the registration requirements of the Securities Act. At the hearing our spokesman on this proposal, Robert L. Foote, of Chicago, took the position that this proposal would reverse public written interpretation of the Act by the commission over a period of twenty years and would be an attempt to effect a change which Congress, though aware of the situation, has refused to make.

The Committee on Corporate Law Departments is planning a two-day joint meeting with the Section on Corporate Law Departments of The Association of the Bar of the City of New York. It is expected that the meeting will be held at the House of The Association of the Bar of the City of New York during April. This Committee is assisting the Corporation Counsel Committee of the Ohio State Bar Association in arranging for a two-day meeting to be held in Columbus, Ohio, on March 21 and 22.

Books for Lawyers

WILSON: THE NEW FREEDOM. *By Arthur S. Link. Princeton: Princeton University Press. 1956. $7.50. Pages ix, 504.*

This is the second in Professor Link's five-volume series of the life and career of Woodrow Wilson. It begins with his first administration, March 4, 1913, and runs through the autumn of 1914. During this period there was enacted against bitter opposition by both right and left, as well as by the vested interests, Wilson's legislative program which he called the "New Freedom". This volume is therefore of especial interest to lawyers. Wilson, born on December 28, 1856, was elected the twenty-eighth President at the age of 56. Until he was near his mid-fifties he was a conservative in his political and economic thinking, albeit a believer in democracy. As President he had moved forward considerably until he stood midway between the conservative leaders of the Republican Party and the progressives, reformers, radicals and agrarians, who were followers of Theodore Roosevelt, William J. Bryan and Robert La Follette.

In the following words, Professor Link gives the gist of the New Freedom:

> In 1913 Wilson was the chief leader of the liberal Democrats and the prime articulator of their *laissez-faire*, state-rights philosophy. The Democrats, he thought, should wipe out the vestiges of special privilege in tariff legislation, liberate credit from Wall Street control, and rewrite anti-trust legislation in order to restore the reign of competition in the business world. This, not the uplift of depressed groups by ambitious projects of federal intervention, was the mission of the New Freedom as he perceived it.

Wilson on becoming President sought immediately to obtain a revision of the tariff downward: not since John C. Calhoun had the tariff been lowered. In this battle, Wilson met his first test. How he dealt with bitter opposition, getting his bill enacted within his first six months in office, makes thrilling reading. The Underwood Act reduced the ad valorem taxes to approximately 26 per cent from 37 per cent and 40 per cent; and at the same time embodied the nation's first income tax law under the constitutional amendment. Thus was quickly confirmed Wilson's supremacy as a leader of his party and of Congress against powerful and entrenched forces. He won because he was "determined, resourceful, and, above all, bold in leadership". The editor of the *London Nation* made the ensuing comment:

> This is Dr. Wilson's tariff in no conventional sense. He called the Special Session, himself framed the Bill, co-operated directly with the legislators of his party in the House and Senate, routed and exposed the audacity of the lobbyists who sought even this year to renew their customary attacks upon the virtue of Congress, and carried the measure to a triumphant issue without mutilation or considerable concession. It has raised him at a single stage from the man of promise to the man of achievement.

Following this triumph he entered the battle for banking and currency reform with the same vigor and determination. As Professor Link says:

> The fight for the Underwood bill was a minor skirmish compared to the controversy that raged over currency and banking legislation; and by the time the latter was over, Wilson had demonstrated more fully than before the qualities that made him a leader.

Arrayed against Wilson was a great majority of bankers who regarded the Federal Reserve Bill with "repugnance ranging from merely strong to violent hostility. From them came denunciations and cries that calamity impended." The presidents of forty-seven state bankers' associations and the heads of 191 clearinghouse associations fought Wilson. The nature of the attacks against him is shown in William Allen White's statement that "the scandalous stories told about Wilson were slanders as foul and unfounded as were ever peddled in any campaign". Opposing him also were reformers and radicals. Had he faltered, there would have been no Federal Reserve System as we know it.

The successful fight which established the Federal Reserve System ended, in December, 1913, the long struggle for banking and currency reform, in which Wilson gave us the two foundation pillars of modern fiscal policy: (1) income taxation and (2) money creation and monetary management. Wilson had "withstood the powerful assaults of private bankers, and had maintained unrelenting pressure upon both houses of Congress until the final victory was achieved. He had given the American people perhaps *their best example of responsible leadership in action*". He had himself said of the need for a Federal Reserve System, "It is absolutely imperative that we should give the business men of this country a banking and currency system by means of which they can make use of the freedom of enterprise and of individual initiative which we are about to bestow upon them"; *i. e.*, lower tariff.

Next came the struggle to strengthen the antitrust laws. Here again there was a long and hard-fought contest. The bill that emerged into law became the Clayton Act and with it there was passed the Federal Trade Commission Act, creating a strong commission with full investigatory powers, and the right to protect fair competition in court. Herbert Croly had said of the Federal Trade Commission Act, "It may amount to historical, political, and constitutional reform."

There should be mentioned from among a number, one more victory for Wilson against the kind of opposition he had met: his fight for the repeal of the Panama Canal Tolls Act. Robert Underwood Johnson wrote the President at this point, "When I think of the obstacles you have encountered and overcome in this conflict for the national honor, the victory seems colossal . . . . To have held your straight course through such a confusion of duty is to have raised a standard for our people for all time."

Wilson's appointments to the Federal Reserve Board brought new attacks from the reformers and the radicals. His legislative achievement was grudgingly acknowledged however by Herbert Croly, who declared: "It was only the New Freedom phase of progressivism that had ended in the autumn of 1914. Wilson, the apostle of *laissez faire* and the opponent of advanced federal social and economic reform, had indeed fulfilled his mission and with a minimum of concessions to advanced concepts. But the future was 'clear and bright with promise' for the progressive movement. Indeed, in the months to come it was Wilson himself who would lead the American people forward in their progress toward a more democratic economic and social order." An article in *The Saturday Evening Post* had stated: He "is curbing and driving the wild horses in Congress with a skill that does him the highest credit. I doubt if any other man, similarly placed, could hold such radical forces in check. Business has nothing to fear from Mr. Wilson so long as he continues his present course."

Professor Link has written a perceptive and objective history of Wilson's New Freedom. It is a scholarly work and deserves high praise. Every assertion is fortified by citations in footnotes from competent authorities. The research and bibliography are impressive. Because of the limited space this review must needs omit any mention of the author's account of Wilson's foreign policy in 1913-14, which was concerned with Nicaragua and Mexico. Nor, for the same reason, can it undertake to discuss the author's penetrating analysis of Wilson's strong character and personality; his incomparable oratory, as Professor Link characterizes it; his unrivalled skill in overcoming parliamentary opposition; and the play of his powerful intellect.

CHARLTON OGBURN
New York, New York

SAY IT SAFELY. *By Paul B. Ashley. Seattle: University of Washington Press. 1956. $2.25. Pages 112.*

This, strictly speaking, is not a book for lawyers though lawyers will find it interesting and informative. It is rather a handbook by Paul B. Ashley, of the Seattle Bar, designed, as the author says, to be a working tool for day-to-day use by all who write or process copy for print or the airways. It is not a reference book for the library. It does not contain a single citation to a published decision. This makes it more practical and useful to serve its particular purpose for newspaper or magazine writers, advertising agencies and broadcasters of either news or commercials, by radio or television. It is not aimed at showing writers, editors or broadcasters how close to the edge of the law of libel or contempt of court they may go with safety. On the contrary, it warns them to avoid the borderlines and take no risks except those calculated risks which duty to the public or regard for their professional honor may on occasion require them to take. It corrects many self-serving misconceptions respecting rights of the press that are held by both seasoned and unseasoned reporters and editors. If read and heeded by those for whose use it is written, the result should be a wholesome and greatly needed improvement in the work of news reporters, business managers, editors, broadcasters, publicity men, advertising agencies and politicians in and out of office. The chapter on the right of privacy is very especially interesting and lawyers should read the book for that chapter particularly. Another very useful chapter for all concerned is Chapter 17 entitled "Danger Zones" with special reference to columnists. The author says that syndicated columnists are involved in a disproportionate number of libel actions and that the hazard of libel is in inverse proportion to the distance.

The newspaper press does not appear to be aware of the development of growing resentment on the part of the public of misleading headlines and false representations respecting public affairs which are characteristic of a large section of the press. It may be supposed that resentment of this characteristic is confined to the intelligent readers, perhaps a minority, who understand the harm done to our public welfare, national and local, by thus poisoning public opinion, the real ruler under our form of government at all levels. But there is also a widespread and growing resentment on the part of readers generally against the invasions of privacy daily committed by gossip columnists of one kind or another, particularly, but not exclusively, those who deal with the scurrilous or trivial tattle of the theatre, the screen or the night clubs. A reader might infer from some of these columns that the main concern of the American people was with the less seemly activities of night clubs and their frequenters.

Out of this resentment has come the enlarged and growing concept of the right of privacy, which has sprung mainly from the judicial mind rather than the common or statute law. And the situation, unless the press and the commentators curb themselves, is likely to breed a demand for legislative restraints on freedom of the press which may be enacted within the Constitution and without the aid of much judicial exegesis. What may be done legally in the way of regulating freedom of the press has been shown in my article on that subject published in the November, 1955, issue of this JOURNAL.

Newspaper publication, as Mr. Ashley says, is an extra-hazardous

profession, and as he also says, "except as granted by statute no publisher or broadcaster has prerogatives greater than those of the ordinary citizen". This is true but it is a precept not generally acceptable or accepted in the realm of journalism.

The publishers have canons of ethics to which they aspire and endeavor to conform, but photographers, reporters, and columnists are not always under contr ol. Those who conform are in competition with those who fail to conform and the ethical cannot disqualify the unethical. Hence journalism is not a "profession" with disciplined standards in the sense that law, medicine, teaching, engineering, architecture, and the Army, Navy and Air Force at officer level are "professions".

Newspapers and radio broadcasters cannot avoid the risk of libel any more than railroads or airline companies can avoid the risk of accidents and damage suits. All they can do is minimize the risk by taking all possible care. Newspapers in particular have a duty in certain circumstances to grasp the nettle danger by taking a calculated risk.

English juries are generally more severe than their American counterparts in libel cases but American juries are quite liberal in awarding damages in libel cases. A jury in a libel case is the judge of both law and fact and may award practically unlimited damages. Only a few weeks ago Randolph Churchill was awarded 5,000 pounds for an uncomplimentary comment on his newspaper work that would barely have been noticed in this country. (See *Time* of October 22, 1956, page 54.)

What is libelous at one time or place may not be libelous at another. To say falsely in Louisiana or Georgia today that a lady of pure white blood is an octoroon would be libelous *per se* at this time, at least, but might not be deemed so in some Northern state. A dead person may be the subject of a criminal libel, but few instances reach the appellate courts and the distinction between the recently dead and the centuries-old dead, if there is any, has not been defined. The safety of publishers in that respect lies in the fact that no prosecuting attorney would risk a quarrel with a publisher who accused Lucrezia Borgia of being a poisoner, although the accusation might by statutary definition be libelous *per se*, and the defense of truth difficult to prove by admissible evidence. Indeed the main protection of the press is that so many persons who are libeled do not bring suit and many of those who do sue are just seeking trouble and damages instead of repairs to reputation. Yet there is no civil action for tort easier to win than one based on an unprivileged publication libelous *per se* if the plaintiff is smart enough not to allege actual malice or ask for punitive damages, for in such a case the plaintiff has only to prove publication and the jury does the rest with almost no limitation on the amount of the verdict. In some states the press has been able to obtain legislation limiting recovery to actual provable damage unless the plaintiff within a prescribed short period has demanded and obtained a retraction. Few newspapers will refuse to give a satisfactory retraction when shown to have published a charge which they cannot prove unless they feel that duty to the public or credit with readers may stand in the way.

In fact there is hardly any issue of any metropolitan newspaper in which a lawyer cannot detect some article often in headlines which is probably libelous, and this notwithstanding that responsible publishers take all care practically possible to avoid wanton libel. But often the fact that the article comes from a respectable newsgathering service or from a special columnist prevents adequate investigation. The newsgathering association or the columnist may have a contract which prevents the newspaper from suing those sources of misinformation (though they may be sued directly by the libeled person) but the newspaper is liable for libelous articles no matter what the source.

Perhaps a paragraph or two on the right of privacy may be pertinent and useful as a tail to this review. The right of privacy as an independent legal concept apart from libel or slander is of relatively recent inception but its recognition by the courts has been rapid and interesting. It seems to have originated in a germinating law review article by Warren and Brandeis (later Justice Brandeis) in 4 *Harvard Law Review* 193 (1890). Dean Pound in a later article, 28 *Harvard Law Review* 343, described it as "a modern demand growing out of the conditions of life in the crowded communities of today". This is a singular but striking modern illustration of the way in which the common law of England took form through the centuries. The right of privacy has been variously defined by courts as the right to be let alone; as the right of a person to be free from unwarranted publicity; and as a right to live without unwarranted interference by the public about matters in which the public is not necessarily concerned; and as the absolute right of every person not to be interfered with to his distress, discomfort or damage.

This is not the place for an exhaustive dissertation on the right of privacy. There is a good note on the subject in 138 A.L.R. 22 following a decision of the U. S. Court of Appeals for the Second Circuit, holding that a truthful article in the *New Yorker* respecting the later quiet and respectable but commonplace career of a formerly famous child prodigy was not actionable as an invasion of the plaintiff's right of privacy, *Sidis* v. *New Yorker*, 113 F. 2d 806, and declaring that in the absence of statute no common law right of privacy exists in New York. But the decision could easily have gone the other way for the court remarks that under the strict standards of Warren and Brandeis the plaintiff's right of privacy had been invaded. The court said also that at least we would permit *limited* scrutiny of the "private" life of any person who has achieved or had thrust upon him, the questionable and in-

definable status of a "public figure". The decision points out that the plaintiff William James Sidis was once a public figure as a child prodigy. The fact that the publicity he then received so irked him that he deliberately chose an obscure career apparently did not take him out of the public domain, at least in New York. But it is well for publishers to bear in mind that the borderline of protected privacy is not clearly defined and danger lurks in overstepping it.

EUSTACE CULLINAN

San Francisco, California

COURTS OF INJUSTICE. *By I. P. Callison. New York: Twayne Publishers. 1956. $6.00. Pages 760.*

The author of this book undertook a tremendous task—a history and critique of justice in the United States—with a description of the Canadian, English and French systems thrown in for good measure.

What Mr. Callison undertakes to prove is that in our system all lawyers for hire are wicked, mercenary persons, and our courts are under their complete control, as a consequence of which justice is non-existent in the United States. Mr. Callison is a reformer. It is difficult to be charitable to reformers because in their zeal for "the cause", they invariably overstate their cases. Mr. Callison has done just that.

Let us look at some of the things he says. About the lawyer:

> Because of the debasement of the judge, the private for-hire lawyer now dominates the system, and this means that the dominant force in the system is a selfish force. The lawyer's objectives are essentially mercenary. He and his family must live. A home, food and clothing must be provided. As a conspicuous member of the community the lawyer must put on a front as becomes a member of a "learned profession." All these call for money and plenty of it. Pride, ambition, avarice will not tolerate failure. Furthermore the chips are down; the die is cast; and there can be no turning back [page 161].
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> All down through the ages the lawyer has been a source of turmoil and trouble, a breeder of discord and the one member of the community determined to eschew honest labor and live by his wits [page 200].

Among other things he says this about the courts:

> Every intelligent layman who has spent a day in court has gone away convinced of the futility of the process. Every man of limited means who has appealed to the courts to right his wrongs, real or fancied, has watched the process with a feeling of helplessness and has quit with a feeling of disgust. He has seen his hard-earned cash eaten up because of the interjection of a flood of technical procedures, a network of evidential rules designed mainly to defeat justice, delay caused by wrangling among the lawyers and appeals on points of procedure having no relation to the merits. Impoverished and helpless, with no measure of redress, he has gone away firmly convinced that the American courts are not a system of justice but an institution which serves only to multiply and perpetuate injustices [page 185].

About our juries, Mr. Callison says:

> As at present selected and denied expert guidance, subjected to the wiles, trickery, subterfuge and impassioned appeals of the lawyers, particularly in criminal cases, the functioning of the petit jury has ceased to serve a useful purpose [page 400].

He has this to say about our judges:

> One of the most disquieting facts developed by the surveys is the almost universal mediocrity, not to say incompetence, of the American judge [page 611].

The book is much too long, its scope too broad, it is repetitive, it is vindictive, confused and confusing, inaccurate and exaggerated. That the author is confused is evidenced by his condemnation of the American Bar Association for what he says is an attempt to limit production of lawyers by recommending strict requirements for admission to the Bar (page 153) while almost in the same breath he commends the English for subjecting the barrister "to a rigid screening process during at least three stages in the long, difficult and expensive process of becoming a court lawyer" (page 155).

Likewise, after pointing out that only a small percentage of cases are tried by jury (page 407), he deftly reverses his field three pages later when he says: "Much of this cost [litigation] is chargeable to the extensive use of the jury." On page 606, he decries the "decadent philosophy" of the legislator, and a few pages later he strenuously advocates the supremacy of statutes over judicial interpretation of them.

Most of the cures suggested by the author for this "tragic failure of this most important department of government" are not original—they have been advocated by many organized Bars for years: better methods of judicial selection, longer terms and better compensation for judges, more extensive use of pretrial procedures, more effective disciplinary measures, unified court administration, more small claims courts and others. The author does advocate one cure, which, in this country, at least, is original with the author. He suggests the liquidation of the "lawyer for-hire" and the substitution of lawyers whose compensation will be paid by the state. It runs in this reviewer's mind that this scheme has been tried in at least one other country. In that country, "justice" has, indeed, been speedy and certain.

Perhaps this review is too harsh. Mr. Callison advocates a great many things with which many lawyers and judges will agree. Despite his exaggeration and obvious bias, there is enough truth in many of his assertions to give thoughtful judges and lawyers pangs of conscience. Had the author been less vindictive and more conservative in his assertions, this book might have had great value. It is unfortunate that its unnecessary bulk, its bitter bias and its heavy style will bury it deep among dead documents.

RICHARD P. TINKHAM

Hammond, Indiana

MR. JUSTICE. *Edited by Allison Dunham and Philip B. Kur-*

land. Chicago: The University of Chicago Press. 1956. $3.75. Pages 241.

Mr. Justice is an anthology of nine vignettes of members of the Supreme Court of the United States. Four of these served as Chief Justice. Two of the four served as a "Justice" before being elevated to the office of Chief Justice; of these, Harlan F. Stone served with continuity in both positions, while Charles Evans Hughes had an interregnum of fourteen years between the end of his term as Justice and the beginning of his term as Chief Justice.

These vignettes include (in the order of their appearance in the book), Oliver Wendell Holmes, John Marshall, Harlan F. Stone, Joseph P. Bradley, Louis D. Brandeis, George Sutherland, Charles Evans Hughes, Wiley Rutledge, and Roger B. Taney. Each vignette was written by a different eminently qualified author, some of whom served as law clerk or as a secretary to some of the Justices. One of the authors refers to his contribution as a résumé of the thought of Justice Brandeis, while the editors refer to each item as "a sketch rather than a full-blown portrait". In the *New Yorker* magazine they would be termed "profiles".

The arrangement of the book seems to have been based upon the alphabetical sequence of the names of the authors. The first sketch, written by Francis Biddle concerning Oliver Wendell Holmes, covers the period of judicial service from 1902 to 1932, while the last sketch, concerning Roger B. Taney written by Carl Brand Swisher, covers a period from 1836 to 1864.

Viewing the sketches in their chronological entirety, they encompass the period from 1801 when John Marshall took office as Chief Justice to 1949 when Wiley Rutledge died. There were twelve Justices who served between 1789 and 1801. The first twelve Justices and years of the existence of the Supreme Court are not represented in any of the sketches. The span of years between 1801 and 1949 is almost completely covered through those "Justice" personalities included, except for a four-year gap between the time Roger B. Taney ceased to be a member of the Court and Joseph P. Bradley became a Justice, and a further ten-year gap between the end of service by Joseph P. Bradley in 1892 and the beginning of Oliver Wendell Holmes' term in 1902. This information is presented so that those interested may become aware of the span of activity of the Supreme Court (or at least those Justices profiled) which is included in all of these sketches.

The publication of *Mr. Justice* appears to have been stimulated by a lament of Justice Frankfurter to the effect, "American legal history has done very little to rescue the court from the limbo of impersonality". Therefore, declared the editors in their preface, "We sought out thinkers . . . who had acquired or attempted to acquire an understanding of a man called a Justice of the Supreme Court of the United States."

While some of the sketches appear to have been written with objectivity, at least one and several passages in some of the others appear to be panegyrics upon the individual Justice. Mr. Swisher in his sketch of Chief Justice Taney writes of the difficulties of appraising the character and official conduct of a judge whose duties were discharged in a different era from ours. He wrote: "In attempting to characterize Taney's life we should first stress awareness that no accumulation of biographical and historical facts can yield more than an approximate conception of the career of a man who lived a century ago. If, as is obviously true, the person now at our elbow, even if seen day by day and year after year, is something of a stranger, much more of a stranger is the man who lived in another age, another environment, and another climate of opinion. We cannot hope to enter fully into his mind and to feel as he did the impact of events and ideas."

What Mr. Swisher wrote about Chief Justice Taney might well have been written about each of the other justices and certainly is implicit, if not actually expressed, in the sketches about them. One is reminded of the preface to Mark Twain's *Joan of Arc,* where he wrote: "To arrive at a just estimate of a renowned man's character one must judge it by the standards of his time, not ours. Judged by the standards of one century the noblest characters of an earlier one lose much of their lustre. Judged by the standards of today there is probably no illustrious man of four or five centuries ago whose character could meet the test at all points."

Reinhold Niebuhr in a recent issue of *Christianity and Crisis* suggests that the current domestic issue of school integration "is almost as great a moral crisis in our national history as the slavery question was. There can be no question but that the same issue of the dignity of man is at stake, though on a different level."

In the light of this vitally important national issue Mr. Swisher's comment upon Taney's views concerning the American Negro has special significance. He wrote: "In his own time the country found Taney wrong, or at any rate the victorious and more articulate part of the country so found him. History condemned him by incomplete quotation as the Chief Justice who had said that the black man had no rights that the white man was bound to respect."

One can only speculate as to the contents of some future sketch concerning Chief Justice Earl Warren. Will such a sketch contain a statement to the effect "In his own time the country found Warren right, or at any rate the more articulate part of the country so found him. History acclaimed him as the Chief Justice who said that the black man had the same rights that the white man was bound to respect."

To do full justice to *Mr. Justice*

the reviewer should comment upon each of the sketches separately, but such treatment would extend the review to undue length. It should be sufficient to indicate that each of the authors gives more than adequate evidence that he is a "thinker" who either had acquired or attempted to acquire an understanding of the man about whom he wrote. Each of the authors has documented his article with copious references. The value of the book for purposes of reference is enhanced by an index of personal names and of cases. One or more of the sketches represent a rather heroic attempt to rescue certain justices from the limbo of impersonality and raise them into levels of personality worthy of comment, but even in these instances the reader will find the sketches informative and interesting.

This is a book well worth reading and owning as a fringe item on the literature pertaining to the Supreme Court of the United States.

NAT SCHMULOWITZ
San Francisco, California

SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION. *By Edmund Morris Morgan. New York: Columbia University Press. 1956. $3.50. Pages 207.*

Columbia University Press has made available to all what some of us heard from Professor Morgan at the 1955 renewal of the Carpentier lectures at Columbia Law School. The lectures are six in number: "Relation of Pleading to Preparation for Trial", "Judicial Notice", "Functions of Judge and Jury", and three lectures dealing with aspects of the hearsay rule, or more precisely with the admissibility of statements not made in court under oath and subject to cross-examination which are offered for the truth of the matter asserted.

The great contribution of these lectures is twofold: first, an insistence upon procedure as an indispensable part of the American system of litigation; and, second, a constant definition of that system as an adversary one designed specifically to determine a contest between *A* and *B*.

Our judicial system was erected and is maintained to decide actual disputes between specific persons and it is the essence of our liberty that it be confined to just that.

In the first chapter, entitled "Pleading and Preparation for Trial", Professor Morgan traces the history of pleading as a method of giving notice of the controversy and coming to the Federal Rules of Civil Procedure says (page 29):

> They frankly abandon all attempt to make a party show his hand in his pleading. The system which they set up is not notice pleading, nor is it pleading under the typical code.

After emphasizing the discovery procedures available to both parties, he concludes:

> The first step toward making a lawsuit a rational proceeding for discovering the factional basis of a controversy is acceptance of these provisions of the Federal Rules. The next is a complete revision of the rules of evidence.

The second chapter deals with the history and application of the various theories of judicial notice and develops his own variant that judicial notice should be confined to indisputable propositions of fact.

In the third lecture, Professor Morgan dealt with the respective functions of judge and jury—including the vexatious problem of the burden of proof—and the use and effect of presumptions.

In the three lectures devoted to the history and application of the hearsay rule, Professor Morgan approaches advocating the admissibility of all relevant evidence not privileged—a result which is certainly not yet acceptable to many practicing lawyers. It is precisely the risk that the trier will be misled that leads many of us to hang on to the exclusionary rules, even though it now be proved that the reasons given for their development are not historically vindicated.

Under the pretrial discovery procedures which abound in most courts today, there is seldom a proposition which can be established only by hearsay evidence—and when that is true—certainly, the greatest caution is needed. To let the evidence in for what it is worth is often to let it in for much more than it should be worth.

We have in these lectures the full flowering of Professor Morgan's ripe scholarship which for more than a half a century has been applied to teaching, writing and drafting—all parts of the central problem of training men to be good lawyers, skilled advocates of their clients' position—competent performers in our adversary system of litigation.

JOHN FLETCHER CASKEY
New York, New York

INTRODUCTION TO GOVERNMENT. *Robert Rienow. New York: Alfred A. Knopf, Inc. 1956. $5.50. Pages 584.*

This is a revised second edition of Professor Rienow's textbook which, while emphasizing the structure of American government on the federal, state and local levels, is a comparative study of that governmental system as contrasted with major competing systems. The author, who is Professor of Political Science at the State University of New York, College for Teachers, Albany, writes in an unusually lucid and direct style.

Professor Rienow proceeds upon the irrefutable, but still sometimes neglected, mid-twentieth century thesis that "the actions and processes of our own government are understandable only in relation to foreign governments". After a brief treatment of the basic idea of government, intended to build a working philosophy of the role of government in human affairs, he devotes separate chapters to a summary analysis of the governmental structures of Great Britain, France, the United States and the U.S.S.R. A very clear picture of similarities and distinctions, theory and practice, is developed in this portion of the book. It is this concentration upon the comparison of American principles of government with those of leading

competitors in the world of ideas, maintained throughout this book, which makes it particularly helpful and appropriate in the present age of recurrent international crises.

In Part III of the text the author considers revolutions, constitutionalism, human rights, federal and unitary government, and the doctrine of separation of powers under the general heading of "The Fountains of Government".

In succeeding portions of the book, Professor Rienow traces the development of an idea from its source in public opinion to its culmination as enacted law. The application of such law is then the subject of examination, particularly in terms of administration and the judicial process.

In the concluding part of his text, the author explores the necessity for global co-operation as well as the prospects and problems of world government. The urgency of our task in terms of the danger of self-destruction is pointedly stated: "The fact that war in a technological age may wipe out victor, vanquished, and civilization is a lesson taught most effectively by the method of demonstration; the trouble is that the learner is killed in the process."

Attorneys will be particularly interested in Professor Rienow's analysis of the relationship of law and the courts to the dynamics of government. It is his view that the law reflects both the dominant power of the state and the limitations upon such power growing out of the interplay of other forces in society. The existence of an independent judiciary is recognized as a fundamental tenet of American political faith and as a *sine qua non* of personal freedom. While the stabilizing effect of "adulation" of the judiciary by the mass of Americans is noted, the author comments in regard to the United States Supreme Court that "In the annals of modern politics this tribal reverence for a body of elder statesmen is almost unmatched." It follows that the significance of the judiciary as a social force cannot be ignored, although to this reviewer it appears that judicial pronouncements are becoming increasingly a topic of lay debate and criticism. Attention is given to the problem of whether judicial review of constitutionality impinges upon the doctrine of separation of powers, as well as what checks, if any, may be imposed upon the judiciary by the other branches of our government through re-examination of its acts. As Professor Rienow suggests, these difficulties are incident to the unique power to void legislative enactments which has been assumed by the judiciary, not by specific constitutional directive, but by its own interpretation.

The emphasis placed upon the understanding of comparative principles of government is the result of the author's awareness of the ever heightening intensity in the competition of opposing governmental philosophies and the resulting strain upon traditional democratic institutions. Professor Rienow observes the effect of this war of ideologies: "The tolerance which is our tradition comes to be challenged as weakness, and free inquiry is confused with treason. It is this crisis in values that impels every intelligent man and woman to a deep concern in political affairs." His conclusion that an educated American citizen cannot be trained provincially and that his vision must encompass the world is inescapable. This book is a stimulating and thought-provoking aid in focusing that vision.

RONALD P. KLEIN
San Francisco, California

POLICE DRUGS. *By Jean Rolin. (Translated from Drogues de Police by Dr. Lawrence J. Bendit.) New York: Philosophical Library. 1956. $4.75. Pages 194.*

Police drugs, according to Dr. Rolin, are those stupefying drugs which are employed in the compulsory psychological exploration of the mind. The book apparently was occasioned by the notorious *Cens* case in which the defendant was charged with traitorous collaboration with the Nazis. Cens had received a gunshot wound in the head, which produced a right side paralysis and what appeared to be a complete aphasia. When the defendant's mental capacity to understand the charge against him and to plead were brought into question, the court appointed a board of three eminent psychiatrists to examine Cens and report their findings. As a part of their endeavor to differentiate between real aphasia and possible malingering, they administered one of these "police drugs". As a result of their examination, they reported that Cens' condition was not as serious as it appeared and that, in their opinion, he was shamming. It was the admission of this report by the court, over objection, which produced such a storm of protest.

In this violent and highly emotional book, the author is particularly exercised over the compulsory use of drugs for extracting confessions—a form of "spiritual rape" (page 9) to use the author's phrase. Drugs employed as medicines for the relief of disease are most desirable; when compulsorily used to obtain information concerning possible unlawful activity they become "police drugs", or, as the author infers, the devil's drugs. According to Dr. Rolin, this whole nefarious business of compulsory truth telling was originated and developed in the U.S.A. first by Dr. Robert House in Texas in 1922, later by Dr. W. F. Lorenz at Wisconsin, and by Calvin Goddard in Chicago. In discussing the reports of these workers, Dr. Rolin comments (pages 49-50): "By presenting things in this light it has been possible to impress on the public the current expression truth serum, implying that pentothal makes the liar tell the truth; a formula at once simple, untrue, redolent of 'Americanism' and one which quite distorts the whole matter". It is quite apparent that in his lexicon, *police* and *American* are dirty words. Much of the book is a metaphysical discussion of the ethical and theological implications of narcoanalysis as viewed in

the author's religious orientation.

Fortunately Dr. Rolin's whole thesis is based upon highly questionable ground. The term "truth serum" (a name coined by an imaginative newspaper reporter), while colorful, is admittedly inaccurate. It isn't a serum and it doesn't necessarily cause one to tell the truth. Little wonder that Dr. Heuyer, the psychiatrist who employed pentothal in the *Cens* case remarked "The truth serum is humbug; it does not exist." After setting up this straw man of compulsory use of infallible truth serum for extracting confessions to be used in court, Dr. Rolin demolishes it with great glee.

The publishers have done their readers a good turn by serving, along with Dr. Rolin's highly emotional and poorly founded argument, an antidote in the form of an appendix on "Narcoanalysis" by Dr. Edward V. Saher, a paper presented at the Third Conference of the International Bar Association, July, 1950. This paper, which constitutes the last eighth of the book, is factual and well reasoned. Obviously Dr. Saher knows what he is talking about. To set the record straight, he states (page 182): "In order to avoid misunderstanding it must be pointed out that narcoanalysis has been extensively applied in the U.S.A. for therapeutic purposes but it has been applied only in a very limited number of criminal cases and only if the defendant has given his consent."

Dr. Rolin's book first appeared in 1950 when the *Cens* case tempest was at its height. It was later translated and abridged for an English edition which was published in 1955. This American edition is a reprint of the one published in London last year.

C. W. MUEHLBERGER
Crime Detection Laboratory
Michigan Department of Health
Lansing, Michigan

DEFENSE INVESTIGATION. *By Edward N. Bliss, Jr. Springfield, Illinois: Charles C. Thomas. 1956. $6.50. Pages 304.*

This book, which is divided into two parts, is a book which offers little to a practicing attorney; in particular, any attorney specializing or practicing in criminal law.

The first seventy-two pages of the book deal with the merits of the public defender system in the State of California and is written by the author from an investigator's point of view, an investigator whose occupation is working for the public defender. This first section of the book relates how the author devoted himself to the art of investigation and how he and his group formed an organization which had as its purpose efficient, factual investigation of violations of the criminal law. This club was named the "Order of Celn". The remainder of this first section deals with the difficulties which confront a public defender and which confront an investigator for the public defender because of the antipathy which most defendants bear towards a representative of the state litigating with the prosecuting attorney who is also a representative of the state and points out the good work and merits of the public defender in the State of California.

Without commenting on the wisdom or merit of the author's contentions, the first section of the book contains no special information which would be of assistance to an attorney preparing for a criminal case although the title of the book lulls the reader into the feeling that somewhere it will take up the delicate questions that often confront the attorney, such as whether to interview a witness or whether such an interview will do more harm than good.

From pages 75 to 280 are listed a number of factual cases under the various penal statutes from murder, assault with a deadly weapon, arson, etc., and under each case is listed the investigation that was performed and the results that were obtained. About all that can be said concerning the contents in this section of the book is that a good investigation begets good results, and that is something that even the casual reader is well aware of.

Therefore, the reviewer believes the two salient factors of this book which are worthy of note are (1) that the public defender system is a good system and that the public defender and his officers should receive more pay, and (2) that a thorough investigation in any criminal case will produce effective results in the courtroom. At least to the latter point, few can take any exception.

All in all, this book offers very little to any practicing attorney.

JAMES J. LAUGHLIN
Washington, D. C.

Make Your Hotel Reservations for New York Now!

■ The Eightieth Annual Meeting of the American Bar Association will be held in New York City on July 14-16, 1957, and will then recess to reconvene in London, England, July 24-30. Most of the Sections of the Association will meet prior to July 14 in New York, and certain of them will reconvene in London. The January, 1957, issue of the JOURNAL carries a detailed announcement concerning hotel reservations in New York (page 75), and at pages 45-47 there will be found the first announcement with respect to the Program, both in New York and in London.

Requests for hotel reservations in New York should be addressed to the Reservation Department, American Bar Association, 1155 East Sixtieth Street, Chicago 37, Illinois, and should be accompanied by payment of the $10.00 registration fee for each lawyer for whom a reservation is requested, UNLESS PREVIOUSLY REGISTERED FOR LONDON, WHICH REGISTRATION FEE INCLUDES THE NEW YORK PORTION OF THE MEETING.

Reservations will be confirmed approximately ninety days before the Meeting convenes.

Review of Recent Supreme Court Decisions

George Rossman
EDITOR-in-CHARGE

Aliens . . . *exclusion orders*

▪ *Brownell* v. *Tom We Shung,* 352 U. S. 180, 1 L. ed. 2d 225, 77 S. Ct. 252, 25 U. S. Law Week 4055. (No. 43, decided December 17, 1956.) *On writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Affirmed.*

In this case, the Court upheld the use of a declaratory judgment action under Section 10 of the Administrative Procedure Act to test the validity of an exclusion order barring an alien from the United States. The exclusion order was entered under the Immigration and Nationality Act of 1952, and the Court sustained the respondent's position that the decision in *Shaughnessy* v. *Pedreiro,* 349 U. S. 48 (1955), involving a deportation order, required the same result as to an exclusion order. The Government contended that habeas corpus was the only relief authorized by the Congress.

The respondent was attempting to enter the United States on the basis of his alleged relationship to an American citizen that had served in the U. S. Armed Forces in World War II. An earlier attempt to enter had been frustrated on the ground that the alleged relationship had not been established. The present action to test the validity of the exclusion order was begun after enactment of the Immigration and Nationality Act of 1952. The Court of Appeals held that the order could appropriately be reviewed by a declaratory judgment action under Section 10 of the Administrative Procedure Act.

Mr. Justice CLARK, speaking for a unanimous Court, applied the *Pedreiro* doctrine in spite of the Government's argument that that doctrine should not apply to exclusion cases because of the basic differences between those cases and deportation cases. Since an alien seeking initial admission to the country is in a different constitutional position from that of a resident alien, the Government contended, general judicial review of his exclusion was precluded. The respondent admitted that there were differences between the two, but countered that all that was involved here was the form of judicial action available, not the scope of review. The Court agreed, noting that the "substantive law governing such actions would remain the rule of decision on the merits but the form of action would be by declaratory judgment rather than habeas corpus." "We conclude" said the Court, "that unless the 1952 Act is to the contrary, exclusion orders may be challenged both by habeas corpus and declaratory action."

The Court then turned to the 1952 Act, and could find nothing to indicate that exclusion orders were to be treated any differently from deportation orders. The finality clause in the statute was held to refer only to administrative finality. A cutting off of judicial review, the Court declared, "as we pointed out in *Pedreiro* . . . would run counter to §10 and §12 of the Administrative Procedure Act."

The Court also concluded that the legislative history of the 1952 statute supported its view of the law.

The case was argued by Oscar H. Davis for the United States and by Andrew Reiner for the respondent.

Aliens . . . *Trading with the Enemy Act*

▪ *Brownell* v. *Chase National Bank,* 352 U. S. 36, 1 L. ed. 2d 99, 77 S. Ct. 116, 25 U. S. Law Week 4019. (No. 24, decided December 3, 1956.) *On writ of certiorari to the Appellate Division of the Supreme Court of New York, First Department. Affirmed.*

Here the Attorney General, as successor to the Alien Property Custodian, sought the *res* of a trust administered by the respondent.

The trust, established in 1928, was the subject of a vesting order issued in 1945 by the Alien Property Custodian under Section 5 of the Trading with the Enemy Act. Later, the trustee brought suit in the New York courts for a construction of the indenture and for an accounting. The Attorney General intervened, seeking to have the income paid to him and a declaration that the powers of the settlor and his right of reversion had passed to the Custodian. The Court of Appeals of New York denied the relief asked by the Attorney General and ruled that the powers sought were vested in the trustee as long as the alien settlor and the beneficiaries were barred from asserting them.

Then, in 1953, the Attorney General amended the vesting order, undertaking to appropriate "all property in possession, custody, or control" of the trustee. In the present suit, begun in the New York courts, he sought to have the principal of the trust transferred to him. The Supreme Court of New York denied relief, and the Appellate Division affirmed. The New York Court of Appeals denied leave to appeal.

The Supreme Court of the United States, speaking through Mr. Justice DOUGLAS, affirmed without reaching the questions presented under the Trading with the Enemy Act. The Court held the present suit to be *res judicata,* reasoning that the Attorney General had in effect claimed the entire trust *res* in the first suit and that he was now merely seeking "for the most part what was denied him in the first suit".

Reviews in this issue by Rowland Young.

Mr. Justice CLARK and Mr. Justice HARLAN took no part in the consideration or decision of the case.

The case was argued by George B. Searls for petitioner, by Thomas A. Ryan for the Chase National Bank and by Samuel Anatole Lourie for the infant respondents.

Commerce . . . *railroads*

■ *United States* v. *Interstate Commerce Commission*, 352 U. S. 158, 1 L. ed. 2d 211, 77 S. Ct. 241, 25 U. S. Law Week 4057. (No. 12, decided December 17, 1956.) *On appeal from the United States District Court for the District of Columbia. Affirmed.*

The question presented here was whether the United States was entitled to an allowance from railroads serving the Port of Norfolk, Virginia, for wharfage and handling services on export freight when the services were performed by the Government. The railroads assume the charges as part of the tariff rate for shippers that conform to the requirements of the tariff. In the Government's case, it was impractical to conform to the tariff requirements and accordingly, the Government contracted for the services directly with the wharfinger The railroads refused to make any adjustment and the United States instituted this proceeding on the theory that it was being subjected to unjust discrimination in violation of the Interstate Commerce Act. The District Court refused to set aside an Interstate Commerce Commission order affirming the carriers' position.

Mr. Justice REED delivered the opinion of the Supreme Court, affirming. After reviewing the history of the case, the Court said that what it amounted to was an attempt by the United States to obtain an exemption from the tariff requirement that calls for the shipper to use a public wharfinger under contract to the railroads to perform wharfage and handling. The Court found that the Government was in no different position from other shippers that did not care to comply with the tariff requirements for one reason or another: "The Government actually is being treated just as any shipper who decides not to take advantage of the services offered in the tariff" the Court observed.

Mr. Justice BRENNAN took no part in the consideration or decision of the case.

There was a dissenting opinion written by Mr. Justice BLACK, concurred in by the CHIEF JUSTICE. The dissent took the view that the Government was being charged for services that it could not use and that this amounted to a plain case of discrimination.

The case was argued by Ralph S. Spritzer for appellants, by Robert W. Ginnane for the Interstate Commerce Commission and by Windsor F. Cousins for the railroads.

Criminal law . . . *false testimony*

■ *Mesarosh* v. *United States*, 352 U.S. 1, 1 L. ed. 2d 1, 77 S. Ct. 1, 25 U.S. Law Week 4001. (No. 20, decided November 5, 1956.) *On motion to remand. Judgment reversed and new trial ordered.*

In this case, the Court ordered a new trial for seven petitioners convicted of violation of the Smith Act. The new trial was ordered because of doubt cast upon the reliability of testimony of one of the principal witnesses for the government at the trial.

The conviction of the seven took place in the District Court for the Western District of Pennsylvania and was affirmed by the Third Circuit by a divided court. The Supreme Court granted certiorari. However, before the case was reached for argument, the Solicitor General filed a motion for remand stating that the Government had serious doubt about the truthfulness of one Mazzei, one of its principal witnesses at the trial. Although the Government took the position that "the testimony given by Mazzei at the trial was entirely truthful and credible", it urged that subsequent incidents made it advisable that the issue of his truthfulness at the Pennsylvania trial be determined by the trial court.

In brief, Mazzei had joined the Communist Party as a government informant, working with the FBI. His testimony at the trial was derived from his knowledge as a Party member. Later, he testified before a Senate subcommittee and still later in disbarment proceedings against a Florida attorney alleged to be a Communist. At those times, Mazzei gave testimony that was untrue, including tales of sabotage, espionage, handling of arms and ammunition, and plots to assassinate Senators, Congressmen and judges.

The Solicitor General suggested that this later testimony may have been the result of a psychiatric condition arising after his appearance in the Pennsylvania trial.

The CHIEF JUSTICE, speaking for the Court, ordered a new trial for the petitioners, declaring that the testimony was tainted and the convictions could not rest on such testimony. The Court refused the suggestion that the case be remanded to the District Court for a finding as to the credibility of the testimony. "Only the jury can determine what it would do on a different body of evidence, and the jury can no longer act in this case" it declared. "Mazzei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed without first draining it of all impurity."

Mr. Justice BRENNAN took no part in the consideration or decision of the case.

Mr. Justice HARLAN, joined by Mr. Justice FRANKFURTER and Mr. Justice BURTON, filed a dissenting opinion. The dissent argued that "sound judicial administration" required return of the case to the District Court for "thorough investigation" of the credibility of Mazzei's testimony.

The case was argued by J. Lee Rankin for petitioner and by Frank J. Donner for respondents.

Criminal law . . . *coerced confessions*

■ *Fikes* v. *Alabama*, 352 U. S. 191, 1 L. ed. 2d 246, 77 S. Ct. 281, 25 U. S. Law Week 4090. (No. 53, decided

January 14, 1957.) *On writ of certiorari to the Supreme Court of Alabama. Reversed.*

The Court here reversed the conviction of burglary with intent to commit rape of a prisoner of low intelligence who confessed after he had been held incommunicado for more than a week while being subjected to repeated interrogation.

There was no evidence of physical brutality, but the Supreme Court found that the "totality of the circumstances that preceded the confessions in this case goes beyond the allowable limits" of the Fourteenth Amendment.

The prisoner was a 27-year-old Negro who started school at the age of 8 and left at 16 while still in the third grade. There was testimony from three psychiatrists to the effect that the prisoner was schizophrenic and highly suggestible. He was arrested in the alley of a white neighborhood in Selma, Alabama, after a series of housebreakings, some involving rape or attempted rape. On the day after his arrest, the prisoner was taken to the state prison eighty miles from his home. He was questioned for "several hours at a time" until he confessed on the fifth day, the confession consisting largely of "yes and no" answers to questions. Both the prisoner's father and his lawyer were denied access to him until after he had confessed.

The prisoner was found guilty and was sentenced to death. The sentence was affirmed by the state's supreme court.

The opinion of the Supreme Court was delivered by the CHIEF JUSTICE. The Court's position was that the treatment given the prisoner, in view of his weak and susceptible character, was a denial of due process.

Mr. Justice FRANKFURTER wrote a concurring opinion in which Mr. Justice BRENNAN joined. This opinion stressed the fact that it was the combination of the circumstances that brought the prisoner's treatment in this case "below the Plimsoll line of 'due process' ".

Mr. Justice HARLAN, joined by Mr. Justice REED and Mr. Justice BURTON, wrote a dissenting opinion which argued that there was "nothing here beyond a state of facts upon which reasonable men might differ in their conclusions as to whether the confessions had been forced". Setting aside the conviction, the dissent urged, "oversteps the boundary between this Court's function under the Fourteenth Amendment and that of the state courts in the administration of state criminal justice".

The case was argued by Jack Greenberg for the petitioner and by Robert Staub for the respondent.

Eminent Domain . . . *sufficiency of notice*

■ *Walker* v. *City of Hutchinson*, 352 U.S. 112, 1 L. ed. 2d 178, 77 S. Ct. 200, 25 U. S. Law Week 4046. (No. 13, decided December 10, 1956.) *On appeal from the Supreme Court of Kansas. Reversed and remanded.*

Declaring that "Notice by publication in too many instances is no notice at all", the Supreme Court here ruled that publication in the city newspaper of notice of a land condemnation proceeding was not sufficient to satisfy the due process requirements of the Fourteenth Amendment.

The appellant was the owner of certain land in Hutchinson, Kansas, which the city sought to condemn in order to extend one of its streets. The only notice given to the owner was the publication in the official city paper. The commissioners appointed pursuant to statute awarded $725 damages and appellant took no appeal within the statutory period. Later he began the present suit in a state court, alleging that he had not known of the condemnation proceedings and that newspaper publication was not sufficient notice. The Kansas trial court denied relief and the decision was affirmed by the Kansas Supreme Court.

Mr. Justice BLACK, speaking for the United States Supreme Court, reversed and remanded. The Court cited *Mullane* v. *Central Hanover Bank*, 339 U. S. 306, for the rule that "notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests". The Court said that no rigid formula could be set up to determine what kind of notice must be given, but in this case there appeared to be no reason why direct notice could not have been sent to the appellant, since his name was known to the city and was on the official records.

In a dissenting opinion, Mr. Justice FRANKFURTER argued that the only constitutional question raised by the appellant was whether failure to give adequate notice invalidated the taking, apart from any claim of loss, and that he had failed to show that the statutory scheme for compensation was inadequate.

In another dissenting opinion, Mr. Justice BURTON expressed the view that the adequacy of the statutory ten-day notice was within the constitutional discretion of the law-making body of the state.

The case was argued by Herbert Monte Levy for appellant and by Fred C. Littooy for the appellee.

Federal Tort Claims Act . . . *amount of recovery*

■ *Massachusetts Bonding and Insurance Company* v. *United States*, 352 U. S. 128, 1 L. ed. 2d 189, 77 S. Ct. 186, 25 U. S. Law Week 4037. (No. 31, decided December 10, 1956.) *On writ of certiorari to the United States Court of Appeals for the First Circuit. Reversed.*

This case raised an interesting question of the proper amount of an award under the Federal Tort Claims Act. That act makes the United States liable for the negligence of its employees "in accordance with the law of the place where the [negligent] act or omission occurred". Another section excludes punitive damages, while a 1947 amendment provides that if the applicable state law provides for punitive damages only, the United States

shall be liable for "actual or compensatory damages". In this case, the negligent act occurred in Massachusetts, where only punitive damages are allowed and where the amount of such damages is limited to $20,000. The question was whether this $20,000 limitation applied to a Federal Tort Claims Act case.

The federal district court awarded damages of $60,000, reasoning that since the United States was liable for "actual or compensatory" damages, the limits in the Massachusetts act were not applicable. The Court of Appeals reversed, reasoning that the federal statute made the state law applicable.

The Supreme Court reversed, speaking through Mr. Justice DOUGLAS. The Court said that the Massachusetts limitation, based as it was on concepts of punishment, could not control a recovery from which Congress has eliminated all considerations of punishment. The Court explained: "The solution that Congress chose was (a) the adoption of the local law—whether punitive or compensatory—to determine the existence of liability of the United States and (b) the substitution of 'compensatory' for 'punitive' damages, where local law provides only the latter."

In a concurring opinion, Mr. Justice HARLAN took the position that the problem was a difficult one, not to be solved merely by a literal reading of the statute. His view was that, while the Massachusetts act provided for punitive damages, Congress had expressly rejected that policy and, once it was rejected, the reasons for the $20,000 limitation vanish.

Mr. Justice REED, Mr. Justice CLARK and Mr. Justice BRENNAN joined in a dissenting opinion written by Mr. Justice FRANKFURTER. The dissent argued that the provision for compensatory damages in states that allow only punitive damages was added to the Tort Claims Act to provide for recovery in two states (Alabama and Massachusetts) which assess liability on a punitive basis. There was nothing to indicate, argued the dissent, that Congress meant to allow unlimited recovery in Massachusetts and at the same time restrict recoveries in other states that allow compensatory damages but with limitations.

The case was argued by John R. Kewer for petitioner and by Paul A. Sweeney for respondent.

United States . . . *government contractors*

▪ *Leslie Miller, Inc.* v. *Arkansas*, 352 U. S. 187, 1 L. ed. 2d 257, 77 S. Ct. 231, 25 U. S. Law Week 4063. (No. 51, decided December 17, 1956.) *On appeal from the Supreme Court of Arkansas. Reversed and remanded.*

The appellant was a contractor which bid successfully for the construction of an Air Force base in Arkansas. Work began on the project in June, 1954. In September, the State of Arkansas began proceedings against the contractor for failing to obtain a license from the state Contractors Licensing Board for the construction. The appellant was found guilty and fined. The Arkansas Supreme Court affirmed.

The Supreme Court reversed and remanded in a *per curiam* opinion. The Court cited the similarity between the state licensing law and the factors set forth in Section 3 of the Armed Services Procurement Act to govern awards of bids for the construction of federal projects to show that there was considerable room for conflict between them. "Subjecting a federal contractor to the Arkansas contractor license requirements would give the State's licensing board a virtual power of review over the federal determination of 'responsibility' and would thus frustrate the expressed federal policy of selecting the lowest responsible bidder" the Court declared.

The case was argued by Leffel Gentry for appellant and by William J. Smith for appellee. John F. Davis appeared for the United States as *amicus curiae*.

Views of Our Readers

(Continued from page 205)

qualify as "frequently"! Further, on no occasion was a witness threatened with severe penalties unless he (or she) responded without further quibbling to the pending question.

Throughout the history of our nation since the Bill of Rights was adopted, the Fifth Amendment has been a frequent cause of confusion and concern. One of the first to invoke the privilege seems to have been Aaron Burr; and referring to his case, the great Chief Justice, John Marshall, commented that "if the declaration (of possible self-incrimination) be untrue, it is in conscience and in law as much a perjury as if (the witness) had declared any other untruth upon his oath".

Surely, not even Dean Griswold will charge that that official was influenced in making that comment by the decision in the Rogers case, which was then over a century away!

BURT DRUMMOND
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What's New in the Law

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Aeronautical Law . . . *federal pre-emption*

■ The Court of Appeals for the Second Circuit, ruling that Congress has occupied and pre-empted the field of air traffic legislation for the Federal Government, has affirmed an injunction permanently enjoining a Long Island village from enforcing an ordinance prohibiting air flights over the village at less than 1,000 feet altitude.

The Court's decision upholds the district court ruling, 132 F. Supp. 871 (42 A.B.A.J. 70; January, 1956). For preliminary proceedings in the case, see 106 F. Supp. 521 (39 A.B.A.J. 233; March, 1953) and 201 F. 2d 273.

Involved was Cedarhurst, which lies near the New York International Airport (Idlewild) on Long Island. Regulations of the Civil Aeronautics Board and the Administrator of Civil Aeronautics require airplanes to pass over Cedarhurst as low as 450 feet under some take-off and landing conditions. Thus a clear conflict was presented between the regulations and the ordinance.

The Court declared that Congress had power to regulate air flights in interstate and foreign commerce and had exercised the power by the Air Commerce Act of 1926, the Civil Aeronautics Act of 1938 and the regulations thereunder, thus pre-empting the field. The Court rejected an argument that the legislation did not authorize control of air space under 1,000 feet altitude.

Two other contentions were turned down by the Court. One was that the federal regulations constituted an unlawful taking of private property, within the ambit of *U.S. v. Causby*, 328 U.S. 356, in which the Supreme Court held that flights of military aircraft over private land which were so low and so frequent as to result in the destruction of the property as a commercial chicken farm constituted the taking of an easement of flight compensable under the Fifth Amendment. The Court felt there was no proof of such low or frequent flights as to bring the case within *Causby*.

Secondly, it was contended that the regulations represented an unconstitutional usurpation of legislative power and the legislation an unconstitutional grant of legislative power to an administrative agency because the legislation's grant to prescribe "rules as to safe altitudes of flight" is not a sufficiently definitive standard. The Court's answer was that this standard was about the only practical one Congress could prescribe in the particular field, where there are many variants, such as weather, terrain, location of cities and airfields and the size and weight of airplanes.

(*Allegheny Airlines, Inc.* v. *Village of Cedarhurst*, United States Court of Appeals, Second Circuit, December 13, 1956, Swan, J.)

Copyright Law . . . *parodies*

■ Comedian Jack Benny was guilty of copyright infringement when he presented a parody or burlesque version of *Gas Light* on television, the Court of Appeals for the Ninth Circuit has ruled. "The fact that a serious dramatic work is copied practically verbatim, and then presented with actors walking on their hands or with other grotesqueries, does not avoid infringement of the copyright", the Court declared.

Gas Light, a play, was published under copyright protection in England in 1938 and produced there the same year. It opened in New York in 1941 as *Angel Street* and enjoyed a long run. M-G-M's motion picture of the play grossed almost $5,000,000. In 1945 Benny presented a radio burlesque of the drama with permission of M-G-M. He did another parody of it in 1952 on his television program, this time without consent. The trial court, finding striking and substantial similarities between the original play and the parody version, granted an injunction against further presentations of the television burlesque.

In full accord with the trial judge's conclusion that there was infringing similarity, the Ninth Circuit rejected the contention that the presentation was permissible under the "fair-use" doctrine. The Court declared this doctrine is normally applied to compilations, listings, directories and digests, as to which a "fair use" of like former works is not infringement, but it said there was no fair-use doctrine "applicable to copying the substance of a dramatic work and presenting it, with few variations, as a burlesque".

(*Benny* v. *Loew's Incorporated*, United States Court of Appeals, Ninth Circuit, December 26, 1956, McAllister, J.)

Courts . . . *photographs*

■ The Supreme Court of Pennsylvania has approved a trial court rule prohibiting the taking of photographs not only in the courtroom but also within forty feet of the entrance to any courtroom and of a prisoner "in the jail or on his way to or from a session of court".

The rule was attacked by seven newspaper editors and photographers as an abrogation of constitution-

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Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

al freedom-of-press guarantees. They had photographed a convicted murderer in a corridor and within forty feet of the courtroom to which he was being taken for sentencing. The photographs were shot with small, infra-red cameras without the knowledge of anyone except the photographers. One of the seven, however, had taken a picture on the ground floor of the courthouse, four floors below the courtroom. All seven were found guilty of contempt of court.

The Pennsylvania Constitution provides that "[T]he printing press shall be free to every person who may undertake to examine the proceedings of the legislature or any branch of government, and no law shall ever be made to restrain the right thereof." It further states that "[A]ll courts shall be open."

The Court declared that whether the case involved freedom of the press was not material, since that freedom is not absolute, but subject to reasonable restriction, such as a restriction designed to promote judicial dignity and the orderly administration of justice. Thus, the Court continued, the problem was one of weighing which consideration deserved protection under the particular circumstances.

Although the pictures were not taken in a courtroom or during a court session, the Court decided that the orderly administration of justice should be protected in this case. It averred that the trial court had power to extend its ban a reasonable distance from the courtroom. "The taking of a picture of a person called for sentence certainly does not inform the public as to any material facts, and serves no purpose except to pander to the lower tastes of some individuals", it added.

But the Court found still another ground to uphold the rule. The prisoner was a ward of the court, it said, to whom the trial court owed the duty of protection against invasion of his right of privacy.

One judge concurred specially as to the validity of the rules and the convictions, except in the case of the photographer who took a picture of the first floor of the courthouse, in which instance he thought the rule stretched too far. Neither could he go along with the right-of-privacy theory.

Another judge dissented vigorously, or, as he put it, "to the ultimate". He felt that the rules violate freedom-of-press rights. He also thought the Court was guilty of a species of entrapment because in a former case it had refused to decide the validity of the rules since no instance of their violation was presented. At that time, the dissenter stated, the Court practically suggested that photographs be taken in violation of the rules so that a test case could properly be presented to it.

(In re Mack, Supreme Court of Pennsylvania, October 5, 1956, Arnold, J., 126 A. 2d 679.)

Fair Trade Laws . . . *McGuire*

■ One of the well-known battlers in the fair-trade arena—Schwegmann Brothers—has been performing again on one of the renowned fair-trade battlefields—Louisiana. The Supreme Court of that state has invalidated the application of the Louisiana fair-trade law to non-signers on the ground that the statute unconstitutionally delegates legislative power to private persons.

The Louisiana fair-trade law, enacted in 1936, was upheld by the Supreme Court of Louisiana in 1942 against a challenge that it was unconstitutional because it permitted combinations in restraint of trade. In 1951, the Louisiana law was involved in the Supreme Court's decision in *Schwegmann Brothers* v. *Calvert Distillers Corporation,* 341 U.S. 384, in which the Court held that although the Miller-Tydings Act authorized minimum resale agreements on goods passing in interstate commerce, it did not permit such agreements to bind non-signers by compulsion, which, the Court ruled, violated the federal antitrust laws.

In an attempt to close the door, Congress in 1952 passed the McGuire Act, 15 U.S.C.A. §45, which specifically authorizes states to extend their fair-trade laws against non-signers and curtails the sweep of the antitrust statutes accordingly. In the light of the McGuire Act the United States Court of Appeals for the Fifth Circuit in 1953 sustained the Louisiana fair-trade law in *Schwegmann Brothers* v. *Eli Lilly & Company,* 205 F. 2d 788.

But sailing for the McGuire Act has not been smooth. The extent to which it has enhanced state fair-trade laws against non-signers has caused a number of casualties. In the instant case, the Court in a footnote adds up twelve states where since 1952 fair-trade laws have been ruled unconstitutional. In six of them the ruling was by courts of last resort. In the same period fair-trade laws have survived in nine states (in eight by courts of last resort).

Now Louisiana joins the states finding fair trade invalid as applied to non-signers. The essential ground of the decision was that legislative power cannot be delegated, except, for example, within limitations to municipal corporations. Here, the Court said, the fair-trade law delegated to the manufacturer and the signing retailer the right to determine the state of things upon which the effect of the law depended, that is, the resale price.

The Court declared that the law also violated due process provisions of both the state and federal constitutions because it interfered with an individual's right to fix the price at which he might dispose of his own property. "The power to regulate private business by coercive price-fixing is a legislative function which may be invoked only under special circumstances, that is, when the measure is seen to have a reasonable relation to the public welfare and is neither arbitrary nor discriminatory", the Court said.

The Court carefully noted that its approval of the fair-trade statute in 1942 did not foreclose the present attack. It pointed out that the only challenge then decided was one of

restraint of trade and that the delegation-of-legislative-power aspect had been neither presented nor decided.

(*Dr. G. H. Tichenor Antiseptic Company* v. *Schwegmann Brothers Giant Super Markets*, Supreme Court of Louisiana, June 29, 1956, rehearing denied September 28, 1956, McCaleb, J., 90 So. 2d 343.)

■ New York is one of the states where non-signer fair-trade laws are valid, and there a federal district court has enjoined the New York operations of a Maryland corporation which appeared to be no more than the alter ego of a New York corporation.

The New York corporation operated as a discount house in New York until late in 1952 when it was curtailed by an injunction under the New York fair-trade act. Twice in 1953 it was fined for violating the order. A few months later it organized a Maryland corporation bearing the same name. Later the Maryland corporation was dissolved and another, still with the same name, was chartered in the District of Columbia, a non-fair-trade jurisdiction.

The factual background thus presented to the Court led it to the conclusion that the Maryland and District of Columbia corporations were but "convenient creatures" of the New York corporation, spawned for the purpose of circumventing the New York fair-trade act. The Court observed that operation and control from the New York corporation pervaded the Maryland corporation and that although the actual defendant was located outside New York, "its contacts with New York permeate its every operation and, viewed as a whole, compel the conclusion that defendant has made New York 'resales' within *McGuire*".

The defendant's contention was that one state's fair-trade laws cannot control the actions of a non-signer located in another state, but selling into the fair-trade area, because an undue burden would thereby be placed on interstate commerce. But in the light of the factual view taken by the Court, the point was not important to the decision. In the absence of such vivid factual impressions, however, a federal district court has held the discount house involved in the present case to be actually operating from the District of Columbia in *Bissell Carpet Sweeper Company* v. *Masters Mail Order Company*, 140 F. Supp. 165, and *Revere Camera Company* v. *Masters Mail Order Company*, 128 F. Supp. 457.

(*General Electric Company* v. *Masters Mail Order Company of Washington D. C., Inc.*, United States District Court, Southern District of New York, September 29, 1956, 145 F. Supp. 57.)

Insurance Law . . . *liability limits*

■ Under the each-occurrence and each-accident liability limit of an automobile policy, one accident happened when a motorist, admittedly negligent, crossed over the center line and collided with three separate motorcyclists traveling in the opposite direction about seventy-five feet apart. So says the Supreme Court of Washington, with three judges dissenting.

At one place the policy referred to a liability limit of "$50,000 each occurrence", and at another "each accident $50,000". The insured motorist, faced with judgments in excess of $50,000, claimed that he had three separate accidents. The insurer, in a declaratory-judgment suit, contended there was only one.

The Court, finding that under the policy "accident" and "occurrence" should be considered synonymous, approached the question from the standpoint of proximate cause. So doing, it ruled there was but one proximate, uninterrupted and continuing cause which resulted in all the injuries and damages, and that therefore there was one accident or occurrence.

The dissenters thought this approach wrong. Applying the rule that insurance contracts must be construed favorably to the insured when there is ambiguity, they declared that "each accident" meant each collision rather than the results flowing from one act of negligence. Three accidents had occurred, they concluded.

(*Truck Insurance Exchange* v. *Rohde*, Supreme Court of Washington, November 8, 1956, Ott, J., 303 P. 2d 659.)

Libel and Slander . . . *religion and damages*

■ The New York Court of Appeals has unanimously affirmed some libel judgments, but has split four-to-three as to whether the trial court should have permitted the plaintiffs to parade not only their religious affiliations but also their religious activities before the jury.

The plaintiffs claimed they were libeled by a political-campaign flyer which linked them with the Communist Party. At the trial, however, the defendants practically conceded that the plaintiffs were not Communists. The Court, affirming modified plaintiffs' verdicts returned by the jury, ruled that calling one a Communist or charging one with having Communist affiliations is defamatory, justifying an action for libel. The Court said that the defense of fair comment would apply to a political-campaign publication, but was not available where, as here, the comments were false and contained unjustifiable inferences.

A harder nut for the Court was consideration of the trial judge's action in permitting the plaintiffs to show that they were members of the Roman Catholic Church and to demonstrate at some length their dedication to and activity in the Church. The trial judge first allowed this on the ground that it tended to show the plaintiffs were not Communists, in view of the Catholic Church's known opposition to Communism, but later he remarked that it was admitted as bearing on damages.

Since the defendants admitted at the trial that the plaintiffs were not Communists, the Court considered admission of the religion testimony only from the standpoint of its relation to damages. Conceding that "in all but the rarest cases" the matters

of religious beliefs and observances are inadmissible because irrelevant, the Court said this was "that rare case in which proof of the plaintiffs' piety and devotion to the tenets of their religion and of their prominence and activity in their church was competent and pertinent" to demonstrate the harmful tendency of the defamation and the damage suffered.

The Court was careful to state that its rule would apply to members of all recognized religious groups, since they are all opposed to Communism.

The three dissenters thought it permissible for the trial judge to allow evidence of church membership, but they objected to the extensive testimony about church activities. "To allow such an extravagant self-spoken display of piety and religious devotion", they said, "could have no other purpose and effect than to incite the sympathy of the jury in plaintiffs' favor and to give them grounds for inflicting severe monetary punishment on overzealous party members for their careless castigation of their opponents in the closing days of a bitterly fought primary contest."

(*Toomey* v. *Farley*, Court of Appeals of New York, October 19, 1956, Conway, C. J., 2 N. Y. 2d 71, 156 N.Y.S. 2d 840, 138 N.E. 2d 221.)

Segregation . . . *civil rights action*

■ A South Carolina Negro woman, Sarah Mae Flemming is having a difficult time with her suit against an intrastate bus operator. She charges that the bus driver required her to change her seat in accordance with segregation statutes of South Carolina, which, she further contends, are unconstitutional and of no force. For this, she seeks damages under the Federal Civil Rights Act.

The United States District Court for the Eastern District of South Carolina first dismissd her action on the grounds that the *School Segregation cases*, 347 U.S. 483, did not apply to intrastate bus transportation and that there was no diversity of citizenship, 128 F. Supp. 469 (41 A.B.A.J. 456, May, 1955). The Court of Appeals for the Fourth Circuit reversed. It had little doubt that the school cases completely wiped out the separate-but-equal segregation doctrine, and it held that federal jurisdiction existed because the bus driver was acting "under color of state law", within the meaning of 28 U.S.C.A. §1343 (a), 224 F. 2d 752 (41 A.B.A.J. 1041; November, 1955).

Back again in the district court, and after trial, the suit was again dismissed, this time on the theory that the driver was not acting under state law and that the Fourth Circuit had not repudiated the separate-but-equal doctrine prior to the incidents involved in the suit. And now again the Fourth Circuit has reversed and sent the case back to the district court.

The Court dismissed as contrary to the evidence the contention that the driver was not enforcing state segregation law with relation to the plaintiff. Answering the other ground, it pointed out that the Supreme Court had decided the school cases prior to the actions on which the instant suit was based and that that opinion made it clear that segregation was dead. The Court declared, moreover, that it is a general rule that reliance on a statute subsequently declared unconstitutional does not protect one from civil responsibility for an act in reliance on the statute, which act would otherwise subject him to liability.

(*Flemming* v. *South Carolina Electric & Gas Company*, United States Court of Appeals, Fourth Circuit, November 29, 1956, Soper, J.)

Segregation . . . *schools*

■ If school officials show no disposition to move toward compliance with the *School Segregation* decisions, the courts will show little sympathy with problems arising in transition from segregation to integration. This seems to be the lesson from the affirmance by the Court of Appeals for the Fourth Circuit of two district-court injunctions requiring relatively quick deaths for school segregation.

In the case of the Charlottesville, Virginia, schools the injunction ordered an end to segregation at the beginning of the school term in September of 1956, while another district court, dealing with Arlington County, Virginia, decreed that segregation expire in the elementary schools at the beginning of the second semester of the 1956-57 school term and in high school in September, 1957.

In neither case did the school authorities indicate that they would undertake to end segregation at any time. In view of this attitude, the Court agreed with the trial courts that nothing would be accomplished by deferring the effective dates of the decrees. The Court averred that taking no steps toward removing racial segregation was not " 'deliberate speed' in complying with the law as laid down by the Supreme Court but was clear manifestation of an attitude of intransigence, which justified the issuance of injunctions to dispel the misapprehension of school authorities as to their obligations under the law and to bring about their prompt compliance with constitutional requirements as interpreted by the Supreme Court."

The Court also ruled that the plaintiffs had exhausted all available and effective administrative remedies and that the actions were not suits against the state within the meaning of the Eleventh Amendment.

(*School Board of the City of Charlottesville* v. *Allen*, United States Court of Appeals, Fourth Circuit, December 31, 1956, Parker, C. J.)

Theaters and Shows . . . *strip-tease*

■ A Newark anti-strip-tease ordinance has been held by the Supreme Court of New Jersey to be a valid exercise of police power, but the Court has indicated that the ordinance might be applied unconstitutionally. The Court ruled that a

group of theater operators and taxpayers are not entitled to a declaration, in the absence of application to a specific case, that the ordinance is invalid as violating constitutional guarantees of freedom of speech.

The ordinance proscribes "[T]he removal by a female performer in the presence of the audience of her clothing, so as to make nude, or give the illusion of nudeness, of the lower abdomen, genital organs, buttocks or breasts."

The Court conceded that in view of the Supreme Court's decision in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, motion pictures and stage shows are within "the protective ambit of constitutional free speech". But, it continued, freedom of speech is not absolute and may be restricted pursuant to police powers within a certain latitude. The Court said the usual permissible limitation is to proscribe what is "lewd, obscene or indecent", and that the ordinance fell within this field.

The Court turned down an argument that the phrase "illusion of nudeness" was too nebulous to furnish a fair criterion. It stated that the words, when interpreted with reason and good judgment, develop a "prohibition sufficiently precise and clear to permit intelligent understanding and enforcement".

The Court (and one judge concurring specially) was careful to point out that its decision would not foreclose another challenge to the ordinance in the light of a specific case. "Individual transgressions alleged to come within the purview of the ordinance will be tested and weighed in accord with the law when the occasion for the prosecution arises," it said. "The respondents will have their full day in court, and if they are trespassed against, the right of appeal will still be available." The Court indicated that its judgment would be made by the standard of the "dominant-effect" or "dirt-for-dirt's-sake" test.

(*Adams Newark Theatre Company* v. *City of Newark*, Supreme Court of New Jersey, November 5, 1956, Wachenfeld, J., 126 A. 2d 340.)

Torts . . . *duty to employee*

■ An employer that voluntarily provides medical examinations for employees is liable for damages occasioned by negligent failure to reveal to the employee that he has tuberculosis, according to the United States Court of Appeals for the Sixth Circuit.

The plaintiff was employed by the defendant from 1944 to 1953, during which time he was required to take several physical examinations, all made by a medical department maintained and staffed by the employer. The defendant's records clearly showed that the plaintiff had inactive tuberculosis. Although one of the employer's doctors testified that she had repeatedly talked with the plaintiff and told him of his condition, the jury apparently believed the contrary testimony of the plaintiff.

Thus the Court was faced with the question of whether the negligent failure to tell the plaintiff about his condition was actionable. Analogizing the case to one in which the employer would be under a duty to warn an employee of a hidden defect on its property, the Court held that the failure to disclose what the medical records showed was a violation of the employer's duty to exercise ordinary care for the employee's safety.

The Court refused to decide the case on the basis of whether the employer, as principal, would be liable for the negligence or failure of a carefully selected physician, as agent, to exercise professional judgment and skill. The Court declared that no agency question existed, since the medical records—failure to reveal which was the gist of the action—were in the possession of the employer and could have been disclosed by any employee.

The Court also held adversely to the employer on limitation of the action. Applicable was a one-year period under Tennessee statute. The suit was commenced within one year from the time the plaintiff left the defendant's employment, but more than one year after the last physical examination had been made by the employer. The Court held that since the action was for failure to fulfill a duty owed an employee, the duty persisted until the employment ended. Therefore, it concluded, the suit was timely since begun within one year of termination of employment.

(*Union Carbide & Carbon Corporation* v. *Stapleton*, United States Court of Appeals, Sixth Circuit, October 5, 1956, Stewart, J., 237 F. 2d 229.)

United States . . . *contempt of Congress*

■ The contempt-of-Congress conviction of an author who refused to say whether he was a "member of the Communist conspiracy" when he wrote books the State Department purchased for overseas library distribution has been reversed by the United States Court of Appeals for the District of Columbia Circuit.

The question's reference to the "Communist conspiracy" was "so imprecise and ambiguous that [the defendant's] refusal to answer was not a crime", the Court ruled. Both the Sixth Amendment and Rule 7 (c) of the Federal Rules of Criminal Procedure require "that the question set forth in the indictment be definite enough to enable the accused to answer it with knowledge of its meaning", the Court added.

The defendant's refusal to answer came in an appearance before the permanent Subcommittee on Investigations of the Senate Committee on Government Operations. The defendant was indicted and convicted under 2 U.S.C.A. §192, which makes it a misdemeanor for a witness before a congressional committee to refuse to "answer any question pertinent to the question under inquiry". Because of its disposition of the case on lack-of-definiteness grounds, the Court refused to consider the defendant's contentions that the subcommittee was not authorized to make the investigation during which the question was

asked and that the question was not pertinent.

Noting that the Committee Chairman conceded in testimony at the trial that he did not know who might determine what persons were members of the "Communist conspiracy" while not members of the Communist Party, the Court declared: "One cannot be held guilty of criminal contempt for refusing to answer a question the intended scope of which is so uncertain that if he attempts to answer it truthfully, according to his understanding of the meaning, he runs the risk of being indicted for perjury because others understand it differently."

The Court turned down the Government's argument that the defendant waived the lack-of-definiteness objection because he did not complain that the question was too vague when it was asked. The Court held that definiteness was an essential element of every crime made so by the Sixth Amendment, and that it cannot be lost by failure to make a seasonable claim, as is possible with the personal privilege against self-incrimination under the Fifth Amendment.

(*O'Connor* v. *U.S.*, United States Court of Appeals, District of Columbia Circuit, December 20, 1956, *per curiam*.)

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Tax Notes

■ **Prepared by Committee on Publications, Section of Taxation, George D. Webster, Chairman.**

Gifts of Securities to Minors Acts—Tax Aspects

by James W. Quiggle, Washington, D. C.

■ In recent years, a number of states[1] have passed gifts of securities to minor acts. These model custodian acts are designed to provide a simple and inexpensive method of giving securities to children. They preclude the possibility of an incomplete gift present in the common practice of registering securities in the name of a nominee. The acts also eliminate a good deal of the expense and inconvenience involved in the appointment of a guardian or the creation of a trust where transferability of the securities is desired and it is deemed undesirable to put them in the name of a nominee.

Generally, the acts allow registration of non-bearer securities in the name of any adult in the minor's family, including the donor, or of any guardian of the minor as custodian for him. Securities in bearer form must be delivered to any adult member of the minor's family other than the donor or to any guardian as custodian and accompanied by the deed of gift specified. Such transfers are irrevocable and convey to the minor indefeasibly vested legal title. The custodian is given power to hold, manage, invest and reinvest the securities, including any unexpended income, and he may apply as much of the principal and income as he deems advisable for the support, maintenance, education and general use and benefit of the minor. In addition, he usually has the investment authority that the prudent-man rule confers. The remaining principal and income is delivered to the minor when he reaches twenty-one or, upon his prior death, to his estate.

Income Tax

In Rev. Rul. 56-484, 1956-40 I.R.B. 8, the income tax aspects of the Colorado model custodian act are discussed. To prevent the unqualified application of the principle in Rev. Rul. 55-469, 2-1955 C. B. 519, wherein dividends on stock given by grandparents to their grandchildren but registered in the names of the parents as nominees were taxable to the minors, it is stated that it was there assumed that none of the income under local law could have been used for the support and maintenance of the minors. A different result, however, may obtain when the income, as the model custodian acts permit, can be used for a minor's maintenance in the discharge of someone's legal obligation of support. In such case, it is concluded:

> . . . *regardless of the relationship of the donor or other custodian to the donee*, income derived from property transferred under the model custodian act adopted by the State of Colorado and a number of other states which is used in the discharge or satisfaction, in whole or in part, of a legal obligation of any person to support or maintain a minor is, to the extent so used, taxable to such person under section 61 of the Internal Revenue Code of 1954. However, the amount of such income includible in the gross income of a person not obligated to support or maintain a minor is limited by the extent of his legal obligations under local law. To the extent that income derived from the property in question is not so includible in the gross income of the person obligated to support or maintain the minor (donee), such income is taxable to the minor. [Italics supplied].

Apparently, then the Commissioner is not going to treat a custodianship as a trust. Thus, there should be no danger that the donor or some other person will be treated as the substantial owner of the securities under Sections 671-678 of the 1954 Code and hence taxed on the income because he had dominion over them. For instance, the custodian has wide administrative powers under the model act. Section 675 considers the grantor the owner of any trust in which he or any non-adverse party has the power to do certain acts, such as, dispose of the corpus or income without adequate consideration, borrow without adequate interest or security, etc. Since those powers are not specifically forbidden by the model acts and are not ordinarily precluded by state law, the Commissioner might have argued that custodians under the model acts (always being either the grantor or a non-adverse party) have too broad administrative authority.

It should be further noted that the Commissioner has read into Section 61 (a) the limitation found in Section 677(b) and 678 (c), wherein under certain conditions only that income which is actually used to discharge a legal obligation of support is taxable to someone other than the trust beneficiary. The result is somewhat gratuitous since there is authority in *Helvering* v. *Stuart*, 317 U.S. 154 (1942), for the taxation to the grantor of all income which may be used to discharge his obligation of support. If the Commissioner had applied the *Stuart* rule, the income would be taxable to the minor only when the minor's parents were deceased and there was no one obligated to furnish his support. Such a result would have rendered the model acts a nullity.

However, a problem may be created by one conclusion reached in Rev. Rul. 56-484, *i.e.*, that income

1. California, Colorado, Connecticut, District of Columbia, Georgia, Michigan, New Jersey, New York, North Carolina, Ohio, Rhode Island, South Carolina, Virginia and Wisconsin.

of the custodianship used to discharge someone's obligation of support is taxable to the person having the obligation, whether he be the donor, custodian or some innocent parent who had nothing whatever to do with the gift. Despite the presence of Section 39.162-1 (f) of Regulations 118, to the effect that income of an estate or trust which may be used in the satisfaction of a legal obligation of any person is to the extent used taxable to such person, it has been widely assumed that when the grantor of a trust is not obligated to support the beneficiaries, neither the grantor, trustee nor the parent is taxable on the income used to maintain them. The enactment of Section 678 (c) in the 1954 Code by indirection implies that parents in the capacity of a trustee or co-trustee will be taxable on the income actually used to support their minors and that probably if they hold the power of applying income to the support of their minors in a nonfiduciary capacity, they may be taxable on all of the income whether or not it is actually used to support their children. However, in the above situations, it is by deliberate action on the part of parent-grantor or a parent-trustee that income is taxable to them.

On the other hand, Rev. Rul. 56-484 can make possible the following situation: *A*, a wealthy man, transfers to himself a large quantity of securities as custodian for *B*'s minor children and uses all the income to support them. *B* is a man of quite modest means and may thus be taxed on the income far in excess of his ability to pay the tax. Trusts are not dissimilar from custodianships, and it is far from certain that non-grantors of trusts can be taxed upon income used to support their children. *Frank E. Joseph*, 5 T.C. 1049 (1945), would hold they are not so taxable. *Contra*, a *dictum* in *Stix* v. *Commissioner*, 152 F. 2d 562 (2d Cir., 1945).

Ordinarily state laws in respect to an obligation of support are vague. It should not be assumed from the ruling that a parent would not be taxable upon the income used, for example, to send his son to college if the law of his jurisdiction did not specifically so require. The broad view that the Service takes of an obligation of support is made clear in Section 1.662 (a)-4 of the Treasury Regulations with respect to trusts, wherein it is stated that "the extent that the parent's legal obligation of support, including education, is determined under local law by the family's station in life and by the means of the parent . . . without consideration of the trust income in question." Accordingly, well-to-do parents may have a greater obligation, quantitatively speaking, to support their children than others who are less affluent, no matter what local law provides.

Gift Tax

Rev. Rul. 56-86, 1956-1 C.B. 449, deals with the gift tax aspects of a gift under the Colorado model act. It is there concluded that transfers under the model act are completed gifts at the time of the transfer to the custodian and that coming within Section 2503 (c), they qualify for the annual gift tax exclusion. Section 2503 (c), in the 1954 Code, exempts from the definition of future interests, which are not available for the annual exclusion, those gifts to minors where the income and property may be expended for the donee's benefit before he attains 21 and will to the extent not so expended pass to him when he reaches 21, or in the event he dies before that age to his estate or as he may appoint under a general power. The fact that the custodian may be the donor or the parent of the donee should bear no significance. In a special ruling dated January 6, 1956 (at 2 CCH Fed. Est. and Gift Tax Rep., par. 8066), the principle of Rev. Rul. 56-86 was applied to a gift by a parent who appointed himself custodian of his children's securities.

Estate Tax

The Commissioner has not yet issued a ruling on the estate tax consequences of transfers under the model act, and there may be some serious questions involved. It would seem that property effectively given under local law with respect to which the annual gift tax exclusion is allowed would not be in the donor's estate, except possibly if it were given in contemplation of death. However, such may not be the result, particularly if the donor is custodian. Section 2038 (a) (1) includes in the gross estate a transfer by a decedent where its enjoyment is subject to a power in him to alter, amend, revoke, or terminate. Inasmuch as the custodian has under the model acts the power to invade principal and in effect terminate the custodianship (which was held in *Lober* v. *U.S.*, 346 U.S. 335 (1953), to be equivalent to a power to alter, amend or revoke), the securities may be included in the donor-custodian's estate if he dies before the minor reaches twenty-one. Until the Commissioner's ruling, it might be prudent for the donor to select a custodian other than himself.

Department of Legislation

Charles B. Nutting, Editor-in-Charge

The Supreme Court and Extrinsic Aids to Statutory Interpretation

■ It is customary to think of the Supreme Court of the United States as a body which is primarily concerned with the determination of constitutional issues. Although of course this is an important part of the Court's function, the great bulk of its decisions involves matters of statutory interpretation. This is not surprising. The policy of the Court to avoid reaching constitutional issues whenever possible, coupled with the fact that federal law is basically statutory, would naturally produce such a result. The truth of this observation is evidenced by a review of the cases decided through December 17 of the present (October, 1956) term. Of the thirteen opinions handed down, nine dealt with the meaning of federal statutes. Two of the nine involved consideration of the legislative history of the acts under review.

The willingness of the Court to consider, if not to rely on, extrinsic aids to interpretation calls to mind the crusade which the late Mr. Justice Jackson carried on against the practice. Although resort to legislative history had become well established in the Supreme Court,[1] the Justice, writing in the AMERICAN BAR ASSOCIATION JOURNAL in 1948, said:[2]

> I, like other opinion writers, have resorted not infrequently to legislative history as a guide to the meaning of statutes. I am coming to think it is a badly overdone practice, of dubious help to true interpretation and one which poses serious practical problems for a large part of the legal profession.

Again in 1951, concurring in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, he said:[3]

> Resort to legislative history is only justified where the face of the act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared. . . . But to select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions.

Perhaps the most caustic of the Justice's utterances on this topic came in *United States* v. *Public Utilities Commission of California*[4] where, again concurring, he stated:

> I should concur in this result more readily if the Court could reach it by analysis of the statute instead of by psychoanalysis of Congress. When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. Never having been a Congressman, I am handicapped in that weird endeavor. That process seems to me to be not interpretation of a statute but creation of a statute.

There were very definite reasons for the point of view thus expressed, as further reference to the materials just cited shows. Basically, the position involves a question lying at the heart of the interpretative process. Is the task of the Court to decide what the *legislature* meant or what the *statute* means?[5] If it is the latter, resort to extrinsic aids becomes largely irrelevant, since an imperfectly disclosed meaning should not bind the parties or the Court. Secondly, the Justice believed that legislative history was largely unreliable in arriving at the meaning of a law. "It is a poor case", he said, "that cannot find some plausible support in legislative history. . . ."[6]

Finally, and perhaps of greatest motivating force as far as Mr. Justice Jackson was concerned, was the belief that legislative history is not equally available to the parties and that reliance on it is thus essentially unfair. The Justice's experience as a small-town practitioner made him acutely aware of the problems confronting a lawyer who does not have ready access to the legislative materials at the command of government counsel.

Whatever may be the merits of the last point, it is clear from recent decisions of the Supreme Court that resort to legislative history can produce widely varying results. In *Mastro Plastics Corp.* v. *National Labor Relations Board*[7] the majority of the Court in an opinion by Mr. Justice Burton held that the loss-of-status provision of the Taft-Hartley Act applied only to contract modification or termination and not to unfair labor practice strikes. The literal language of the statute as to loss of status appeared clearly to apply to all strikes. Mr. Justice Burton, however, found the law "sufficiently ambiguous" to permit resort to the legislative history. He relied heavily on a statement by Senator Ball, who was the manager of the 1947 amendments to the statute and one of the Senate conferees, to the effect that the provision in question was aimed at "quickie" strikes, which, the Justice said, are generally used to gain economic advantage. The Senator also stated that the provision was not intended to take away any of the rights of labor. Largely on the basis of this statement the Justice interpreted the statute in such a way as to permit unfair labor practice strikes without loss of status.

1. See Nutting, *The Relevance of Legislative Intention Established by Extrinsic Evidence*, 20 B. U. LAW REV. 601, 602 (1940).
2. 34 A.B.A.J. 535, 537 (1948).
3. 341 U.S. 384 (1951).
4. 345 U. S. 295 (1953).
5. *Supra*, note 2.
6. *Idem.*
7. 350 U.S. 270 (1956).

On the other hand, Mr. Justice Frankfurter, joined in dissent by Justices Minton and Harlan, found the statute unambiguous and clearly applicable to unfair labor practice strikes. In addition, he pointed to a minority committee report (which the majority refused to recognize as significant) expressly calling attention to the likelihood that the provision would be applied to all strikes.

In another very recent instance legislative history has seemed to point two ways at once. The case[8] involved the question of whether *per diem* employees of the United States Government were entitled to holiday pay consisting of an extra day's compensation for each holiday worked during the relevant period. This, in turn, involved the interpretation of a resolution passed in 1938. The majority held that the 1938 resolution completely repealed a resolution passed in 1885 upon which the claim to additional compensation was predicated. Mr. Justice Burton dissented in an opinion concurred in by Justices Frankfurter and Black, expressing the view that the 1885 resolution had not been repealed and that therefore the claim for compensation should be allowed. The merits of this intricate controversy are not important here. It is, however, significant to note that both the majority and the minority relied on legislative history. The majority referred to the committee report, including correspondence with the Civil Service Commission and the Comptroller General, to comments from the floor during debate, to administrative practice and to legislative inaction in the light of such practice. The minority pointed to administrative practice under the 1885 resolution, to a letter in 1937 from the Acting Comptroller General, to an earlier version of a resolution offered to deal with the question of holiday pay, to the same committee report relied on by the majority and to remarks from the floor. Thus, three members of the Court, using virtually the same materials as the majority, arrived at an opposite conclusion.

One other instance may be noted. In *Leedom* v. *International Union of Mine, Mill and Smelter Workers*,[9] the Court unanimously held that the National Labor Relations Board did not, under the relevant provision of the statute, have power to enter an order of decompliance against the union because its officers had sworn falsely in taking the non-Communist oath. The significance of the case for present purposes lies in the weight attached to a statement by Senator Taft in the Senate to the effect that previous versions of the bill providing for an inquiry by the Board as to Communist affiliations of union officials had been replaced by the provision requiring only the filing of affidavits. This, said the Senator, was done in order to prevent delays. Mr. Justice Douglas, who delivered the opinion of the Court, happily remarked: "This explicit statement by the one most responsible for the 1947 amendments seems to us to put at rest the question raised by this case."

It seems evident that in spite of the strictures of Mr. Justice Jackson the Court will continue to make use of legislative history. Although the practice undoubtedly does have some undesirable aspects, resort to such material as an aid to interpretation may be useful. However, caution should be exercised, particularly with respect to consulting the legislative history in order to create and then resolve an ambiguity not apparent on the face of the statute. Furthermore, courts should discourage deliberate ambiguity on the part of legislative draftsmen who, after employing vague language in a bill, will build a record supporting a particular construction which may not be the most obvious one.

8. *United States* v. *Bergh*, 352 U.S. 40, 25 LW 4013 (1956).
9. 352 U. S. 145, 25 U. S. Law Week 4042 (1956).

Justice, sir, is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever her temple stands, and so long as it is duly honored, there is a foundation for social security, general happiness, and the improvement and progress of our race. And whoever labors on this edifice, with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher in the skies, connects himself in name, and fame, and character, with that which is and must be as durable as the frame of human society.

—Address by Daniel Webster reprinted in W. W. Story, *Life and Letters of Joseph Story* (Boston: Charles C. Little and James Brown, 1851), Volume II, at page 624.

OUR YOUNGER LAWYERS

Kirk McAlpin, Secretary and Editor-in-Charge, Savannah, Georgia

■ The American Medical Association has issued an invitation to doctors and lawyers to get together to discuss mutual problems of the two professions in meetings to be held at the Atlanta Biltmore Hotel in Atlanta on March 15-16, at the Cosmopolitan Hotel in Denver on March 22-23, and at the Benjamin Franklin Hotel in Philadelphia on March 29-30.

Junior Bar Conference members will be interested in the discussions, which will include trauma and disease, medical expert testimony and the medical witness. There will also be a mock trial which will feature the introduction of chemical tests for intoxication.

In announcing the series, C. Joseph Stetler, Director of the American Medical Association's Law Department, said, "Medicine and law must work together so frequently that we feel open discussions of mutual problems are of the utmost importance."

Registration fee for each symposium will be $5.00, which includes the cost of a luncheon session and a copy of any proceedings which are published. Advance registrations, which are encouraged due to limitations of the audiences, should be sent to the Law Department, American Medical Association, 535 North Dearborn, Chicago 10, Illinois.

Seattle Younger Lawyers Committee

In 1949, The Board of Trustees of the Seattle Bar Association established a Younger Lawyers Committee. Under the present direction of Robert S. Mucklestone, of Seattle, current JBC Chairman for Washington, establishment of a Junior Bar Section in Seattle is now being studied and undertaken.

The Seattle Younger Lawyers Committee is setting a high mark for other local units to shoot at. They have selected several interesting projects for this year, and they are proceeding with vigorous enthusiasm to accomplish their goals, already having behind them to their credit several successful ones.

Just recently, following the admission ceremony in the Superior Court of King County, Washington, for lawyers who had lately passed the bar examination, the Younger Lawyers entertained with a coffee hour in honor of the newly admitted attorneys. Distinguished members of the Bar explained the objectives of the American Bar Association, the Junior Bar Conference, the Washington and the local bar associations. Sample petitions for admission to practice before the United States District Court were distributed, and an explanation was given of the necessary procedure for practice before that Court, the Tax Court and the Treasury Department.

The first mass admission program in the Federal District Court was sponsored on October 22 by this Committee, at which time twenty-six lawyers were presented to the court by Robert S. Mucklestone in a very impressive ceremony. John C. Bowen and William J. Lindberg, United States District Court Judges, both expressed great satisfaction with the program and encouraged its continuance as a regular function.

On November 27, a preview of the new film, "The Medical Witness", was given to the Clinical Section of the American Medical Society at its annual meeting in Seattle. The Olympic Bowl at the Olympic Hotel was selected for the premiere. Victor W. Ewen, of Louisville, Kentucky, Chairman of the Junior Bar Conference's Medico-Legal Committee, appointed Robert S. Mucklestone to promote attendance of the local Bar at the showing of the film. Only a few days' notice could be given, but with the able assistance of John Nicholson, of Seattle, and that city's very energetic Younger Lawyers Committee, the local Bar was informed of the event. An excellent attendance had been expected, but by 8:00 P.M., the hour scheduled for the showing, no standing room was left, and a second showing was necessary.

"The Medical Witness" is presented by the Law Department of the American Medical Association, using a cast composed for the most part of doctors and lawyers. It shows the trial of a damage suit, involving an intervertebral disc injury. Contrast between the testimony and cross-examination of a well-prepared and an unprepared doctor graphically demonstrates the necessity for skilful preparation of medical testimony by the doctor and attorney.

Oklahoma Junior Bar Elects

On November 30, the Oklahoma Junior Bar Section held its annual meeting with the Oklahoma State Bar Association at Tulsa. Whit Pate, County Attorney for Leflore County, was elected State Chairman, Joseph M. Best, of Tulsa, Vice Chairman, and Bryce A. Baggett, of Oklahoma City, Secretary.

Payne H. Ratner, Jr., of Wichita, Kansas, Council Member of the Junior Bar Conference for the Tenth Circuit, attended the luncheon meeting and participated in the program, making a short talk to encourage membership in the Junior Bar Conference of the American Bar Association.

Youthful Circuit Attorney

St. Louis, Missouri, now claims to have the youngest Circuit Attorney-Elect in cities over 500,000. Thomas F. Eagleton, 26, a member of the Junior Section, was elected last No-

vember on the Democratic ticket.

Tom has been nominated, along with a very able young trial lawyer, Rexford H. Caruthers, who is a past president of the Junior Bar Section, for the Distinguished Service Award of the St. Louis Junior Chamber of Commerce.

New Committee Appointments Announced

David H. Gambrell, of Atlanta, who has been active in JBC work for several years, has been appointed Chairman of the Lawyer Reference and Legal Aid Committee.

John Rendleman, of Carbondale, Illinois, has been selected to head a Special Committee on Traffic Law Enforcement, with particular emphasis on support of the Sixteen Resolutions on Traffic Safety unanimously adopted in 1951 by the Conference of Chief Justices.

Thomas E. Taulbee, Jr., of Wilmington, Delaware, well known to JBC members through his previous work with the Conference, has accepted the Chairmanship of the very important By-Laws Committee. After varied committee work, he did a noteworthy job as Chairman of the Membership Committee in 1955, after which his services were utilized as Personnel Director for 1956. Since many changes in the By-Laws were proposed by the Committee on Reorganization, it was imperative that this Committee be headed by one thoroughly conversant with the various phases of the JBC, and Taulbee's experience gives him the requisite background qualifications.

Denver Regional Meeting Plans Announced

Vernon T. Reece, Jr., of Denver, as Chairman, Richard C. Dibblee, of Salt Lake City, Payne H. Ratner, Jr., of Wichita, Kansas, Robert B. Keating and Jack Verne Temple, of Denver, Keith H. Zook, of Boulder, Colorado, Edmund D. McEachen, of Omaha, Nebraska, John G. Gage, of Mission, Kansas, Whit Pate, of Poteau, Oklahoma, E. E. Lonabaugh, of Sheridan, Wyoming, Earl H. Carroll, of Phoenix, and Richard H. Nebeker, of Salt Lake City, constitute the JBC Committee which is working to make the eight-state "Mountain and Plain" Regional ABA Meeting at Denver from May 7-10 an unqualified success. States in the region are: Arizona, Colorado, Kansas, Nebraska, New Mexico, Oklahoma, Utah and Wyoming.

The Colorado Junior Bar Section will have a reception for all registrants from 5:30 to 7:30 on Wednesday, May 8.

Since Thursday and Friday afternoons were allocated to meetings of the various Sections of the American Bar Association, Saturday, May 11 has been designated as "Junior Bar Conference Day", and will start with a breakfast for JBC members followed by a stimulating workshop in which all state JBC chairmen of the region have been asked to participate. The meeting will end Saturday with a social affair that evening for Junior Bar members.

The Junior Bar Conference will also co-sponsor a panel on "Trial Tactics". Robert B. Keating, of Denver, has been appointed to take charge of this phase of the program.

ASSOCIATION CALENDAR

ANNUAL MEETINGS

New York City and London	
New York City, Association	July 14 - 16, 1957
New York City, Sections	July 12 and 13, 1957
London	July 24 - 31, 1957
Los Angeles, California	August 25 - 29, 1958
Washington, D. C.	August 24 - 28, 1959

BOARD OF GOVERNORS MEETING

Denver, Colorado	May 10 - 12, 1957
Administration Committee	May 10, 1957
Board of Governors	May 11 and 12, 1957

REGIONAL MEETING

Denver, Colorado	May 9 - 11, 1957

BAR ACTIVITIES

Charles Ralph Johnston • Editor-in-Charge

Philip S. HABERMANN

■ A long cherished dream of the lawyers of Wisconsin will be fulfilled by the erection of a general headquarters building for the State Bar of Wisconsin in Madison this year. Several years of careful planning culminating in an energetic drive for funds, which commenced in October, 1956, together with the well known public spirit of the Wisconsin lawyer, will bring this dream to full fruition.

Edward T. Fairchild, former Chief Justice of the Supreme Court of Wisconsin, has this to say of the new Wisconsin Bar Center:

> For years forward-looking members of the Bar have dreamed of a building that would serve its lawyers and symbolize the spirit of our profession. It is now within our grasp to make that dream a reality. Architecturally, the suggested plans call for a modest but efficient structure of quiet dignity. This building has been envisaged as a home and workshop serving the Bar from a focal point. It will be a symbol of friendliness and mutual understanding among those who own and occupy it, where lawyers may come to enjoy the spirit of fraternity which has always been the pride of our profession. Let us hope that the building may kindle within us a sense of public service and a feeling of kinship with the great lawyers who have gone before us, and that through it our joint efforts to promote equal justice under the law will be intensified.

From the time of the first organization of the lawyers of Wisconsin in 1878 until the establishment of a central headquarters office on a full-time basis in December, 1948, the organized Bar in Wisconsin had no headquarters office. During most of these years, the affairs of the association were conducted out of the office of Gilson G. Glasier, the state law librarian and long-time secretary of the voluntary bar association.

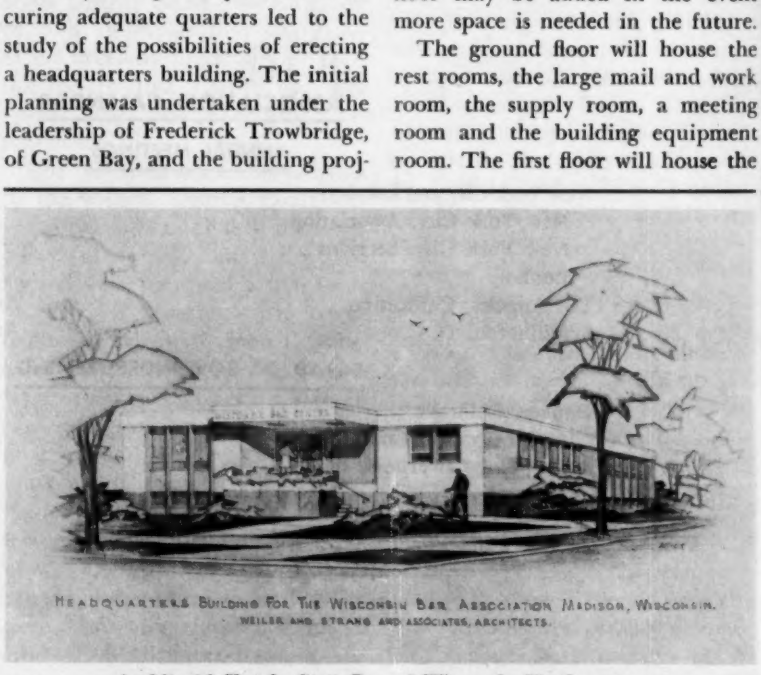
In 1948, the constitution and by-laws of the then voluntary association were revised. Dues were substantially increased and a full-time executive secretary was hired. Since that time both membership and activities of the organized Bar have rapidly expanded. The current staff now consists of five full-time persons, headed by Philip S. Habermann, Executive Director and editor of the *Wisconsin Bar Bulletin*.

Since 1948, the headquarters office has occupied rented space in one of the better office buildings in Madison, utilizing approximately 1,100 square feet. Increased activities resulted in a serious need for increased space for equipment, storage, meeting rooms and staff accommodations. Several years ago the problem of securing adequate quarters led to the study of the possibilities of erecting a headquarters building. The initial planning was undertaken under the leadership of Frederick Trowbridge, of Green Bay, and the building project was launched by Alfred E. LaFrance.

Early in 1955, it was decided that the construction of its own headquarters building by the organized Bar was both feasible and necessary. It was early determined that the location of the building should be in Madison, the state capital, and soon thereafter a suitable site was acquired. The site is only two blocks from the state office building and within walking distance of the State Capitol and business district. It consists of a corner lot 100 feet by 132 feet, with entrances and exits on both streets. This will permit the location of the building with an adequate setback from each street and still permit the parking of eighteen cars at the rear.

Preliminary estimates indicated a cost of approximately $135,000 for an adequate building designed to fit the needs of the Bar. The architectural firm of Weiler and Strang and Associates was retained and the plans now are rapidly nearing completion. The building is to be fifty-two feet by sixty-six feet, with a full basement partially above ground level. The building is designed so a second floor may be added in the event more space is needed in the future.

The ground floor will house the rest rooms, the large mail and work room, the supply room, a meeting room and the building equipment room. The first floor will house the



Architects' Sketch, State Bar of Wisconsin Headquarters

administrative offices, the bar materials library, a board of governors' room and a small service kitchen.

In October, 1956, the statewide fund drive, seeking contributions from lawyers of all parts of the state, commenced under the leadership of George S. Geffs. Pledges to date exceed $70,000, with the campaign continuing.

Although there was no connection between the planning for the building and the integration of the Bar in Wisconsin, which became effective January 1, 1957, the increased membership of the association and the expanded services to members which are contemplated further accentuates the need for larger quarters.

Robert D. Johns, of La Crosse, President of the State Bar of Wisconsin, says:

> Today is a day of great opportunity. I am sure that most of us, since that memorable day when we were admitted to the Bar, have recognized the need of a headquarters building in Madison—of a home we could call our own. Today we have the opportunity to realize this hope.
>
> The State Bar Building Committee has undertaken a great responsibility. It is no small chore to raise $200,000 . . . . A great deal of planning and preparation has gone into these fine plans for our future home. One of Wisconsin's leading architects has poured his inspiration into its blueprints and its prospectus. It has been designed especially for an attractive corner lot at West Wilson and Broom streets in Madison, only three blocks from the Capitol. It is intended to provide utility, durability and simple elegance without ostentation.

George S. Geffs, of Janesville, Chairman of the Building Fund, and Alfred E. LaFrance, of Racine, President of the Wisconsin Bar Foundation, expressed themselves as follows:

> In addition to being the administrative headquarters and home for the lawyers of Wisconsin and their "service center" in the truest sense, the Bar Center will fill an urgent need for a "clearing house" of bar information —a means of co-ordinating the work of our committees, our law schools and the bar associations in other states, and making the results available to the profession and the public.

President Johns states that the present timetable calls for completion of plans and getting bids by mid-April, with construction to begin as soon thereafter as possible. The two old homes occupying the site already have been razed. Unless there are unexpected delays, it is estimated that the State Bar of Wisconsin will be able to occupy its new headquarters by the end of this year. The executive committee of the State Bar is serving as the building committee.

Hear ye! Hear ye! Hear ye! All Wisconsin lawyers—and any who have strayed beyond the boundaries of the state—Philip S. Habermann, Executive Director of the State Bar of Wisconsin, has the following message for you:

Pursuant to the Order of the Supreme Court integrating the Bar of Wisconsin, all non-resident lawyers admitted in Wisconsin must register and maintain membership in order to preserve their right to practice in that state. No person who fails to enroll during 1957 shall be permitted to enroll in the State Bar of Wisconsin thereafter, unless ordered by the Supreme Court. If you have not received notice by mail, write to Philip S. Habermann, Executive Director, State Bar of Wisconsin, 122 West Washington Avenue, Madison 3, Wisconsin, for registration information.

■ The New York State Bar Association held its 80th Annual Meeting in New York City on January 23-26. President Cloyd Laporte, of New York City, presided.

The meeting, held at the House of The Association of the Bar of the City of New York, was welcomed by Mayor Robert F. Wagner. Sir Francis Rundall, British Counsel General at New York, and newly appointed Ambassador to Israel, delivered an address on "The Middle East".

Clarence R. RUNALS

Newly elected officers are Clarence R. Runals, of Niagara Falls, President; and the following Vice Presidents: Raymond J. Scully, of New York; George C. Wildermuth, of Brooklyn; John T. DeGraff, of Albany; John H. Dewell, of Greenwich; George R. Fearon, of Syracuse; C. Addison Keeler, of Binghamton; C. Everett Shults, of Hornell; Millard J. Noonan, of Batavia; Paul F. Bleakley, of Yonkers; and Charles Margett, of Jamaica. William J. Darch, of Batavia, was elected to serve his third term as Secretary and Robert C. Poskanzer, of Albany, was elected to serve his sixteenth year as Treasurer. John E. Berry, of Albany, is the Executive Secretary.

S. Hazard Gillespie, Jr., of New York City, Chairman of the Membership Committee, reported that membership in the association is over 9500 and he stated that at the present rate of growth the membership would pass the 10,000 mark early in the summer.

The Association's sixth annual Gold Medal Award for distinguished service in the law was presented to John Lord O'Brian, of Washington, D. C. Prior award winners were: Nathan L. Miller, 1952; John W. Davis, 1953; Robert H. Jackson, 1954; Arthur T. Vanderbilt, 1955; and Harrison Tweed, 1956.

Paxton Blair, of New York City, Chairman of the Committee on Professional Ethics, offered a resolution amending Canon 20, which was adopted by the membership of the Association. The new canon reads as follows:

> It is unprofessional for a lawyer to make or to sanction the issuance or use by another of any press release, statement or other disclosure of information whether of alleged facts or of opinion for release to the public by

newspaper, radio, television or other means of public information, relating to any pending or anticipated civil action or proceeding or criminal prosecution, the purpose or effect of which may be to prejudice or interfere with a fair trial in the courts or with due administration of justice.

The foregoing shall not be applicable to publications of statements made in court or to quotations from public records of the court or from depositions filed or served or pleadings or affidavits filed or submitted to the court. However, this canon shall not be so construed as to limit the right of an attorney in good faith to divulge information for publication in reply to any public statement which adversely affects the interest of his client, provided that the information is supported by facts and does no more than contradict or mitigate the effect of said statement.

The Antitrust Law Section, attended by approximately 500 members and their guests, was addressed by Herbert Brownell, Jr., Attorney General of the United States, on "Atomic Energy and Free Enterprise". John W. Gwynne, Chairman of the Federal Trade Commission, and Victor R. Hansen, Assistant Attorney General of the United States and head of the Antitrust Division of the Department of Justice, spoke on the "Significance and Enforcement of Federal Antitrust Law".

The Banking Law Section, with 225 members and guests present, honored George A. Mooney, Superintendent of Banks for the State of New York, at the luncheon held in connection with its meeting.

The Food, Drug and Cosmetic Law Section viewed the film "The Medical Witness", and heard addresses on the Federal Food, Drug and Cosmetic Act delivered by George P. Larrick, Commissioner of Food and Drugs in the United States Department of Health, Education and Welfare, and by H. J. Anslinger, United States Commissioner of Narcotics.

The Insurance Law Section meeting, attended by 150 members and guests, heard a panel discussion on "Law, Insurance and Nuclear Reactor Installations Operated and Designed for Experimental Testing or Power Purposes". The Section entertained as its guests of honor at the luncheon Leffert Holz, Superintendent of Insurance for the State of New York, and Angela R. Parisi, Chairman of the Workmen's Compensation Board of the State of New York.

A two-day session devoted to problems confronting attorneys for county and local governmental bodies was held by the Municipal Law Section. Addresses were delivered by Joseph J. Kelly, Deputy Comptroller for the State of New York, and by James O. Moore, Jr., Solicitor General of the State of New York.

The Taxation Law Section meeting was attended by 130 members and guests. Guests of honor included Russell B. Train, Assistant to the Secretary of the Treasury, and the members of the New York State Tax Commission.

Edward Bennett Williams, of Washington, D. C., discussed "The Trial of Criminal Cases in Modern Times" at the meeting of the Trial Lawyers Section, which had an attendance of over 700.

Weston Vernon, Jr., of New York City, was moderator of a panel discussion on federal income taxation at the meeting of the Young Lawyers Section.

The Committee To Co-operate with Bar Associations and Federations, under the chairmanship of Sidney B. Pfeifer, of Buffalo, conducted a workshop for local bar officers. Over sixty-four officers of local bar associations throughout the state attended. The program consisted of a panel discussion on unlawful practice of the law with Raymond Reisler, of Brooklyn, Chairman of the Committee on Unlawful Practice of the Law, as moderator.

Approximately 1100 persons attended the annual dinner at the Waldorf Astoria Hotel, climaxing the four-day meeting. Addresses were delivered by Associate Justice John M. Harlan of the United States Supreme Court, Judge Adrian P. Burke of the New York State Court of Appeals, by John Lord O'Brian, and David F. Maxwell, President of the American Bar Association.

Joseph G. HODGES

■ The Colorado Bar Association has adopted a judicial selection plan for submission to the legislature which would in effect take the judges out of politics. The proposal, which is similar to the Missouri Plan, would change the present partisan elective system to one in which a non-partisan commission would select candidates for vacancies, with the governor then appointing from the candidates. The nominating commissions would vary for the different posts to be filled. Half of each commission would be laymen and half lawyers, with no political party holding more than half the posts on the commission. Under the proposal, the state's present judges would serve out their regular terms. On completion of his term, should an incumbent elect to seek office again, the only question on the ballot would be: "Shall Judge John Doe be retained in office? Yes – No –".

The nominating commission would nominate candidates whenever an office becomes vacant—through death, resignation, removal from office or the failure of the incumbent to seek re-election. The commission would present three names to the governor within thirty days of the vacancy. The governor then would have thirty days to name one of the three to the bench. If the commission failed to nominate, it automatically would vacate office and the governor would appoint a new commission. If the governor failed to act, the supreme court would.

The Colorado Bar Association has initiated a complete study of the justice-of-the-peace system in the

State of Colorado and has made a study of and completed a new proposed business corporation act, based upon the model act prepared by the American Bar Association. The current officers of the association are: President, Joseph G. Hodges, of Denver; President-Elect, William W. Gaunt, of Brighton; Vice Presidents, Edward H. Ellis, of Boulder, Leo S. Altman, of Pueblo, James M. Noland, of Durango, and Richard M. Davis, of Denver; Treasurer, Fritz A. Nagel and Secretary, Donald S. Molen, both of Denver. Harry S. Petersen, of Pueblo, is the Colorado Bar Association representative in the House of Delegates of the American Bar Association.

■ Bruce G. Lynn, President of the Columbus Bar Association (Ohio), is working with nearly 500 members on the forty committees of the association to accomplish two goals during his term of office: improve the economic condition of Columbus lawyers, and increase the number of qualified jurors for the Columbus courts.

The Lawyers Economic Betterment Committee has made a survey, the results of which soon will be announced. The survey will indicate the use of the Minimum Fee Schedule adopted by the association and the changes desired by the members; indicate the income and expenses of Columbus lawyers and determine changes to be made in fees and billing practices and determine the income from various fields of practice as a result of individual practice or practice as a partner. To be of most value, the survey will be tabulated by age groups.

Recognizing the need for a greater number of qualified jurors, the association is attempting to educate the public in the duties of jurors. The Speakers Bureau Committee, the Junior Lawyers Committee and the Public Relations Committee are working with the high schools, industrial plants, churches and many small organizations. These groups are being shown a kinescope of a television show, "Primer for a Juror", prepared by and presented recently under the joint sponsorship of the Columbus Bar Association and a local television station—WBNS-TV.

In the Public Service

■ We ask every bar association which has published any public service pamphlets, leaflets or other materials to make them available to any other association interested, for a nominal charge, with permission to adapt, reproduce and distribute them under the name of such other association.

We shall be happy to serve as liaison agent in this matter and we ask every bar association to inform us whether it will, or is unable to, participate in this undertaking. From the secretary of every participating association, we should appreciate receiving a letter giving the requested permission and enclosing three copies of each such pamphlet, leaflet or other material; we then shall publish under the above caption the name and address of the association which prepared the material, its title and, if necessary, a brief resume of its contents.

To obtain the courtesy of using any public service materials mentioned in this section, the executive secretary or secretary of your association should write to the publishing association, enclosing a check for 50 cents for the first six copies or less plus 5 cents for each additional copy requested, to cover the costs of handling, packaging and mailing. If in special cases there is a greater charge for any item, the amount will be stated.

We believe that those participating in this joint endeavor are making a substantial contribution to good public relations of the Bar while rendering a public service of the highest order.

■ The following were prepared by the STATE BAR ASSOCIATION OF CONNECTICUT, 30 Oak Street, Hartford, Connecticut:

Zoning Laws is a brief, well-prepared, practical, common-sense discussion for the layman of an important segment of our laws filled with danger for the uninformed. The discussion proceeds under these heads: What Are Zoning Laws?; What Is Zoning?; Adoption of Zoning Laws; Non-Conforming Uses; Variances; Zoning Law Enforcement; Zoning Board of Appeals; and Zoning Information and Aids. **"It's the Law"** is a list of seventeen common questions of law with answers, which should be of interest to every layman. They follow: In Connecticut how old must a person be to enable him to make a will? Under Connecticut law can a husband (or wife) cut his spouse out of his will? In purchasing real estate, will a warranty deed from the seller be sufficient to fully protect your interest? Must a man will one dollar to each of his children to make his will valid? Is a cash binder given to the seller or a real estate agent by the buyer of the real estate adequate to safeguard the rights of the parties? What should you do if you are involved in an automobile accident? Does your ownership of property mean that you have a marketable title? Can your lawyer be compelled to reveal secrets which you have confided in him? Is ownership of property in joint tenancy with right of survivorship as good as a will? Are the objections raised by lawyers in court trials intended to confuse witnesses? May any intelligent adult plead his own case in court? Is a lawyer's first step in a divorce case often to try for a reconciliation? Is the prosecutor "out to get" you if you are charged with a criminal offense? What is a conditional sale? Must you carry liability insurance on your automobile? Must you serve on a jury if called?

Why does a lawyer defend a person accused of a crime even if he knows or feels that the person accused is guilty?

Wills . . . Their Importance and Why You Should Have One contains a practical and well done "discussion for the layman of an important problem which time and tradition have covered with needless mystery and confusion" under these topics: What is a will? May a person dispose of his property in any way he wishes by will? Does a will create more probate expenses? What happens when there is no will? Is a joint tenancy a substitute for a will? Does a good life insurance program take the place of a will? Is every estate subject to inheritance and succession and other death taxes? Who should draft the will?

Your Home, The Most Important Purchase of Your Lifetime contains a cautionary paragraph warning that the law has trained lawyers to handle legal problems, just as medicine has its trained specialists to handle medical and surgical problems; and that lawyers can save one untold heartache and financial difficulty for a nominal amount in relation to the amount to be invested and the protection afforded. The discussion is broken down into the following topics: 1. Why You Should Consult an Attorney *Before* Dealing with Real Estate; 2. What Can an Attorney Do To Assist You in Your Dealings with Real Estate? (a) Your Contract; (b) Your Title Search; (c) Mechanic's Liens; (d) Closing the Deal; 3. What Can You Do? It also contains this caveat: "This pamphlet, based on Connecticut law, is issued to inform, not to advise. No person should ever apply or interpret any law without the aid of a trained expert. When in doubt, consult your attorney!"

Nominating Petitions

(Continued from 241)

C. B. Elwell and Edward J. Ober, Jr., of Havre;

Melvin E. Magnuson, Paul T. Keller and Wesley W. Wertz, of Helena;

W. T. Boone, Russell E. Smith, Jack W. Rimel, Jack L. Green and Sherman V. Lohn, of Missoula.

Montana

■ The undersigned hereby nominate Julius J. Wuerthner, of Great Falls, for the office of State Delegate for and from Montana, to be elected in 1957 for a three-year term beginning at the adjournment of the 1957 Annual Meeting:

James M. Haughey, William J. Jameson, Otis L. Packwood, John S. Goff, William H. Bellingham, Robert E. Cooke, Ira F. Beeler and Arnold A. Berger, of Billings;

James T. Finlen, P. L. MacDonald, W. M. Kirkpatrick, Sam Stephenson, Jr., P. J. Berget, Joseph B. Woodlief, H. G. Dean and Earle N. Genzberger, of Butte;

Rudolph C. Harken, of Forsyth;

Newell Gough, Jr., Taylor B. Weir, Henry Loble, A. W. Scribner, H. J. Luxan, Jr., James T. Harrison and Fred Lay, of Helena;

Donald G. Nutter, of Sidney.

Nebraska

■ The undersigned hereby nominate George H. Turner, of Lincoln, for the office of State Delegate for and from Nebraska, to be elected in 1957 for a three-year term beginning at the adjournment of the 1957 Annual Meeting:

Louis A. Holmes, of Grand Island;

Ralph D. Nelson, Robert B. Crosby, C. C. Fraizer, Bert L. Overcash, Clarence A. H. Meyer, Gerald S. Vitamvas and Willis R. Hecht, of Lincoln;

Earl E. Morgan, Robert H. Beatty, Rush C. Clarke, George B. Dent, Jr. and M. M. Maupin, of North Platte;

Keith Miller, Raymond G. Young, K. B. Holm, Thomas Marshall, Albert C. Walsh, W. C. Fraser, W. W. Wenstrand, Robert G. Fraser, Paul L. Martin, Frank L. Frost and Clement B. Pedersen, of Omaha;

Kenneth M. Olds, of Wayne.

New Jersey

■ The undersigned hereby nominate Sylvester C. Smith, Jr., of Newark, for the office of State Delegate for and from New Jersey to be elected in 1957 for a three-year term beginning at the adjournment of the 1957 Annual Meeting:

Charles S. Moore, Herbert Horn, James N. Butler, Elwood F. Kirkman, Frank P. Mulligan, Myrtile Frank, Jr., Allen B. Endicott, 3d, and Daniel Bell, Jr., of Atlantic City;

John H. Yauch, Jr., James E. Fagan, Conover English, Francis E. P. McCarter, Merritt Lane, Jr., Arthur L. Nims, III, Ward J. Herbert, Martin Kesselhaut, Milton M. Unger, Edward J. Gilhooly, John J. Clancy, John R. Hardin, Jr., Frank C. O'Brien, Mahlon Pitney and Robert P. Hazelhurst, Jr., of Newark;

Robert K. Bell and French B. Loveland, of Ocean City.

Oklahoma

■ The undersigned hereby nominate Howard T. Tumilty, of Oklahoma City, for the office of State Delegate for and from Oklahoma to be elected in 1957 for a three-year term beginning at the adjournment of the 1957 Annual Meeting:

Earl Q. Gray, of Ardmore;

Clark Nichols, W. R. Withington, George H. Shirk, Ben Franklin, Gus Rinehart, Benjamin E. Stockwell, Donald H. Clark, Calvin W. Hendrickson, Paul C. Duncan, Donald F. Gust, John R. Couch, William L. Robertson, James W. Shepherd, John E. Wagner, Jack A. Swidensky, Charles V. Wheeler and Byron Lamun, of Oklahoma City;

Ray S. Fellows, Gerald B. Klein, Charles R. Fellows, Floyd L. Rheam, G. Ellis Gable, Whit Y. Mauzy and W. Valjean Biddison, of Tulsa.

(Continued on page 288)

(*Continued from page 238*)

Property, in everyday life, is the right of *control.*

Property in Land. With respect to property in land, we need merely note that the acquisition of an original title to land from a sovereign is a political act, and not the result of operations of the economy. If the original distribution of land unduly favors any group or type of persons, it is a political defect and not a defect in the operation of the economy as such. A capitalistic economy assumes and recognizes the private ownership of land. It may, as under the federal and state mining laws and federal homestead acts, encourage private ownership of land by facilitating private purchasing of mining, timber, agricultural, residential or recreational lands.

Property in Capital. In a capitalistic economy, private ownership in all other articles of wealth is equal in importance to property in land. From the standpoint of the distributive aspects of a capitalistic economy, property in capital—the tools, machinery, equipment, plants, power systems, railroads, trucks, tractors, factories, financial working capital, and the like—is of special significance. This is true because of the growing dependence of production upon capital instruments.

Of the three components of production land is the passive[1] source of almost all material things except those which come from the air and the sea, while labor and capital are the active factors of production. Labor and capital produce the goods and services of the economy, using raw materials obtained, for the most part, from land. Just as private property in land includes the right to all rents, the proceeds of sale of minerals and other elements or substances contained in land, private property in capital includes the right to the wealth produced by capital. The value added to iron ore by the capital instruments of a steel mill becomes the property of the owners of the steel mill. So in the case of all other capital instruments.

Property in Labor. What is the relationship of the worker to the value which he creates through his work? It has been said that no one has ever questioned the right of a worker to the fruits of his labor. Actually, as was long ago recognized by John Locke and Jean Jacques Rousseau, the right of the worker to the value he creates is nothing more than the particular type of private property applicable to labor. Each worker, they said, has a right of private property in his capacity to produce wealth through his labor and in the value which he creates.

Marx and Property. Marx did not err in his understanding of the dependence of capitalism upon private property. In fact, the Communists, following Marx, appreciate this absolute dependence more than do non-Communists, many of whom, influenced by the conviction that Marx is full of errors, have falsely entertained the idea that this is one of them.

Marx, however mistaken he was in his program for achieving the economic changes he thought were needed, cannot be charged with having intended to worsen the economic and political condition of modern man. The facts of his life and character permit us little doubt that his intention was to eliminate suffering by substituting a fairer distribution of economic goods and services, and through this, a more equitable distribution of leisure and the opportunity to lead a good life. Marx was rightly, if also vehemently, critical of the exploitation of the many by the few.

Had Marx seen that the socialization of capital (*i.e.*, its ownership by the state) would *of necessity* place the control of capital in the hands of those currently wielding political power, thereby unifying economic and political power, the two basic sources of social power, we can assume that Marx would not have advocated the destruction of private property in capital instru-

1. Agricultural and timber land may be said to be an exception to this, since in growing crops and timber, agricultural and timber lands may be said to function in an active manner.

ments. If the factory owners of the nineteenth century, having political influence but not unlimited political power, were in a position to exploit the workers, the bureaucrats of the twentieth century in a socialized state, possessing not only unlimited political power, but also unlimited economic power through ownership (*i.e.*, control) of the instruments of production, are infinitely better equipped to exploit workers and other non-bureaucrats. What better proof of this than Russia and the Russian satellites?

The Communist Politician . . . *A True Tyrannical Capitalist*

It is the Communist politician who sees in Marxism the opportunity for personal power and wealth which Marx, if we may take him at his word, failed to perceive. The Communist politician perceives in Communism the personal advantage to himself which comes with the transfer of property (working control) in the means of production to the state, and the elevation of himself to a place in the management of the state. The Communist politician is thus able to epitomize in himself the kind of tyrannical capitalist Marx declaimed against, with the further opportunity for unlimited despotism that is inherent in the fusion of political power and economic power in the same hands.

Marx's failure to perceive the political significance of private property has allowed his doctrine to furnish the most perfectly designed ruse for potential tyrants that has ever been devised. In the name of benefitting society as a whole, the actual control of the capital instruments and land is placed in the hands of those wielding political power!

Marx's second great error prevented him from seeing that *the ideal* "classless society", of which he dreamed, is not one in which a political group in power has the function of distributing wealth. It is rather the political economy in which the *individual* ownership of property—particularly capital instruments—is spread over the entire population. Only such a broad distribution of private economic power can guarantee individual freedom and the power of the people as a whole to limit or turn out at will a political group in power.

Marx was actually on the verge of recognizing that so long as men are what they are, capitalism is the only possible classless society. His failure to do so derives from his failure to understand the *political significance of private property*. He consequently also failed to understand the political significance of state ownership in a socialist state. To concentrate control over the means of production in a political group is to establish that administration as a class—an all powerful class—and to remove all possibility, so long as such a group exercises its power fully and ruthlessly, to overthrow such despotism by means other than force.

Marx recognized that the men who were the owners of productive property also enjoyed "individuality", leisure and opportunities for culture and education. (*Ibid.*, page 581). This being so, it is nothing short of fantastic that he brought himself to these illogical conclusions: (1) Destroy private ownership of productive property. (2) Make all men workers. (3) Appropriate all wealth produced in excess of that required to sustain workers, and let it be distributed by the state as its political leaders see fit.

The political commissars, however, who employ Marx's ideas for their own purposes—the exploitation of power and wealth which socialism offers to a ruling bureaucracy—are not so illogical. The destruction of private property in the means of production is their guarantee of self-perpetuation.

There is a Marxian tenet that the nature of a society is determined by the mode of production (whether agricultural or industrial), and the ownership of the means of production. It is sound. The conclusions here reached are within and consistent with this fundamental insight.

Thus the second great Marxian error caused Marx to seek in socialism what he could have found only in capitalism.

Error No. 3: Mistaking the Wealth Created by Capital for Wealth Created by Labor and Stolen by the Capitalists. Each of the three critical mistakes which Marx made in his study of capitalism arose from the fact that he began his analysis with a study of distribution, *rather than with a study of production.* At the distributive end, something less than a tenth of the population, for the most part owners of land and capital, were faring infinitely better—receiving a proportionately greater share—than were the other nine tenths, whose only participation in economic activity was as workers or as recipients of public charity under the poor laws. The pattern of distribution was bad from whatever standpoint it might be judged. Those who were receiving the great share were the capitalists, the owners of the expanding industrial and commercial enterprises.

For Marx, capitalism was simply what he observed in the European world around him, and primarily in Great Britain. Since the distributive pattern was unsatisfactory, capitalists and capitalism, he concluded, must be at fault. Labor had "historically" been the source of all production of wealth, and the workers were now receiving a progressively smaller proportion of the proceeds of production. Down with capitalism!

Had Marx started with an objective analysis of production and a deeper insight into the property-freedom relation, he might well have concluded with a declaration of war against capitalists *for hoarding capitalism.*

Let us now examine once more the principles of capitalistic production that Marx might and should have used as a starting point. In an exchange economy, and particularly in an economy of freely competitive markets, each service and each commodity is valued for its peculiar ability to satisfy a certain desire of the consumer. Whether the service or commodity is produced by labor alone or by capital alone or by the co-operation of these two, is unimportant to the potential purchaser except as the method of production implants specific characteristics in the thing marketed. It is the finished product which is demanded by the purchaser, not the knowledge that it is produced in one way or another —a mere means by which the product was brought forth. Contrary to what some sentimentalists think, there is nothing sacred about the products of labor that is not equally sacred about the products of capital or those produced jointly by capital and labor.

To effect any change in the nature or position of material goods or to perform any kind of a service, material goods must be acted upon. Marx recognized this; but, because of his obsession with the labor theory of value, he contended that only labor could be credited with the value of material goods produced or services performed. "Useful labor" he said, "is an eternal necessity imposed by Nature without which there can be no material exchanged between man and Nature, and therefore no life." *(Ibid.* page 50). To effect such changes in matter, or to perform such services, purely physical, *i.e.,* mechanical means, must be used. With rare exceptions, pure thought is not economically compensable. Speech, writings, mechanical action—all these things, performed by man, are capable of entering into economic transactions. The thought behind such speech, writings, mechanical action, is not *by itself* capable of entering into ordinary commerce.

Man as a non-scientific and non-managerial subsistence-laborer is, from the standpoint of economics (aside from his separate nature and position as the consumer), a primitive, low-horsepower engine, relatively clumsy and of brief durability, for the production of economic goods. Man the worker, except in the fields of science and management, has grown steadily less impressive since the onset of the industrial revolution. He can work eight, ten or twelve hours at a stretch and then must rest. His strength and speed of action are quite limited. He is subject to numerous ailments, often adversely affected by climate, temperamental and not infrequently lazy. He makes many mistakes. As a factor in the production of wealth, man is progressively less successful in competing with capital instruments, except, again, as a scientist or as manager.

It is not as a worker that man is master of the earth. It is as the *intelligence* behind all production, and as the consumer—the reason for production and the destiny of the things produced—that he is supreme.

It may well be that confusion between man the worker and man the thinker—the source of all ideas and plans—contributed as much as any cause to Marx's failure to recognize capital as a producer of wealth in the same sense that labor is. Mental activity enters into economic transactions primarily in two ways: (1) the mental activity of the scientist and manager is responsible for the invention, development, improvement and production of capital instruments, and the supervision of productive activity of both laborers and capital instruments. Scientists and managers are in general the top echelon of *labor*—the professional level. Their services include entrepreneureal activities, in which they provide the initiative in organizing the capital and labor to institute or expand particular business activities. A substantial portion of their services is rendered in improving the productivity of capital instruments, thus promoting the substitution of machines for men and otherwise reducing labor requirements, where to do so will reduce the costs of production and render the businesses in which they are engaged more efficient and competitively better. The steady improvements in capital instruments, systems of production, and organization of productive processes, are the results of the mental activity of the scientists and managers. Their ability to produce in these fields is the secret of their rising productiveness and the increased demand for their services.

(2) Mental activity enters into non-scientific work and non-managerial work in varying degrees. The intelligent direction by the worker of his own activities is incidental to the mechanical work performed by him. Labor is compensated for a particular type of service of a physical nature which could not be ren-

dered in the absence of intelligent direction on the part of the worker himself.

Marx recognized that machines and men are competitors in the sense that scientists and managers, in carrying out their function to produce goods and services in a competitive market, strive to eliminate labor costs and to improve upon hand methods of production. "The instrument of labour [meaning, of course, machines, *the instruments of the capitalist*] when it takes the form of a machine, immediately becomes a competitor of the workman himself." (*Ibid.* page 470) In speaking of this competition, Marx comes as near as possible to recognizing that capital instruments are active forces in the production of wealth, performing an economic function of the same sort as labor, and frequently performing functions which can interchangeably be performed by either.[2]

Marx observes that in the case of the handcraft industries, "the workmen are parts of a living mechanism. In the factory we have a lifeless mechanism independent of the workman, who becomes its mere living appendage.... By means of its conversion into an automaton, the instrument of labour confronts the labourer, during the labour process, in the shape of capital, of dead labour, which dominates and pumps dry living labour power. The separation of the intellectual powers of production from the manual labour, and the conversion of those powers into the might of capital over labour, is, as we have already shown, finally completed by modern industry erected on the foundation of machinery. The special skill of each individual insignificant factory operative vanishes as an infinitesimal quantity before the science, the gigantic physical forces, and the mass of labour that are embodied in the factory mechanism and, together with that mechanism, constitute the power of the 'master'." (*Ibid.* page 462). It may well have been Marx's failure to recognize that capital instruments in practice supplant not only physical forces, but intelligence, that deterred him from recognizing that capital "works" just as labor works.

Whether Marx could have closed his eyes to the facts of production in the now-dawning age of automation is an interesting speculation. Yet even in Marx's own day it should have been possible for him to recognize that the scientists (engineers) in designing capital instruments build into these instruments the capability of performing operations which, if performed by labor, would require the application of brainwork. His obsession with the labor theory of value rendered him incapable of this insight.

But today, with the development of feed-back, self-correcting and self-programming machines, capable of automatically performing a sequence of logical operations, correcting their own errors as they perform their productive tasks, choosing from built-in instructions or characteristics their proper functions, it is likely that even Marx would have broken through his barrier-obsession that labor does all the work.

Human minds ultimately direct the production of goods and services. This is true of the functions of capital instruments as it is of workers. As a production process uses more and more capital instruments, more of the human mental *control* of the process of production is shifted away from workers to scientists (and their mechanical progeny) and to management. Thus the private ownership of labor is not, in action, essentially different from the private ownership of capital. Each involves the right of control of an active means of production, the right to take the fruits of such production, to produce where and when the owner desires, and to accept or reject conditions of production. The most significant difference is that the owner of capital instruments is not required to be personally present in the productive process; he produces, or in any event he may produce, vicariously. Mental activity as such is not the basis of the property rights of either labor or capital owners in wealth produced.

What difference would it have made to Marx's theory of capitalistic economics if he had recognized both the power of labor and the power of capital instruments to create wealth? *It would have made all possible difference.*

If all wealth is created by labor, and if the total wealth created is in excess of that distributed to labor on the basis of the market value of labor, then the excess is "surplus value". This surplus value, according to Marx, is something really stolen from labor by the capitalist. It is elementary that wealth belongs to him who creates it, and if only labor *can* create wealth and capital instruments *cannot* create wealth, then the owners of capital have no possible claim to a share in the proceeds of production. The most they could legitimately claim would be to have the value of their original capital, which has been partly or wholly consumed in the productive process,

2. Note that by using the term "instruments of labor" to designate *capital instruments owned by capitalists*, Marx is again indulging the labor theory of value. By referring to capital instruments as "instruments of labour", Marx makes it appear logical to attribute the productive efforts of capital to labor.

restored to them. In the socialist state, this "surplus value" is something that would belong to society as a whole, to be distributed as the administrators of the state decide.

In short, if labor is the only possible creator of wealth, then capital cannot be a creator of wealth, and there can be no legitimate return to capital other than a return of the original investment. The recognition by Marx of capital as one of the two active factors creating wealth would have exposed the falsity of his own basic theories. More than that, he would have been led inevitably *to exactly the opposite conclusions.* If labor is entitled to a return in the form of wages for wealth created by labor, then the owners of capital should be entitled to a return for the wealth created by capital.

Strange as it may seem, Marx recognized the technological trend and even acknowledged that it appeared to be the case that the net wealth remaining after payment for raw materials and labor was wealth created by capital. Yet he refused to believe this *appearance,* and simply asserted again and again that this excess was "surplus value". With regard to the increasing productivity of capital, he noted that "every introduction of improved methods... works almost simultaneously on the new capital and on that already in action. Every advance in chemistry not only multiplies the number of useful materials and useful applications of those already known, thus extending with the growth of capital its sphere of investment.... Like the increased exploitation of natural wealth by the mere increase in the tension of labour power, science and technology give capital a power of expansion independent of the given magnitude of the capital actually functioning." (*Ibid.* pages 663-664) With respect to the apparent production of wealth by capital instruments, Marx acknowledged that there appeared to be, as Sismondi had said, a "*revenue* which springs from *capital*". But he refused, to the very end, to believe that it was the wealth created by capital—a possibility he saw but never understood or appreciated. To Marx, the wealth *created* by capital remained "surplus value" to which the owners of capital had no claim—surplus value stolen by the owners of capital from the owners of labor.

Marx's Three Errors . . . *A Fateful Near Miss*

But for the basic and demonstrable errors in his theory of capitalism—the three errors discussed above—Marx would have reversed his views about capitalism and socialism. His writings leave no doubt that he was making an honest search for the truth about capitalism and the causes of maldistribution of wealth under capitalism. But it is also true that his writings leave no doubt that, had he caught and prevented himself from falling into his three foundational errors, he would have become as defiant in his espousal of capitalism as he erroneously was vehement in its denunciation.

If labor alone is a creator of wealth, there must be, as Marx and Engels said in the *Communist Manifesto,* equal liability of all to labor. But if capital is a creator of wealth, one may participate in the production of wealth either as an owner of labor or as an owner of capital. Similarly, if land is a source of wealth, one may participate in the production of wealth as an owner of land. But this basic capitalistic principle goes further. If, as we know, the productivity of capital is increasing in relation to that of non-managerial and non-scientific labor, and if the right to participate in the distribution of the proceeds of production follows from the fact of participation in production, the social justice which Marx sought lies *in regulating the capitalistic economy so that there emerges an ever-increasing proportion of capitalists.*

The uneasy ghost of Marx must suffer the torments of the damned at the truth glaring from the pages of history that *one does not abolish property by transferring it to the state.* To put an end to *private property* in capital and land by establishing the socialist state is to concentrate the vast aggregate of property rights in the wielders of political power. There is no mystery in the fact that through a literal application of the theories of the great seeker after social justice, the Communist countries have achieved the exact opposite of what was promised. Marx wailed over the plight of the helpless worker under the merciless lash of the powerful factory owner. What would he say of the plight of the worker before the inescapably crushing power of the dictator, the political clique, or the party which in fact (though never in name, since everything is always done in the name of *"the people"*) owns all factories, all instruments of production, all land, *and fuses this power with political power?*

There can be only one answer. The safety, the security, the dignity of the individual which Marx sought in socialism can be found only under capitalism. The answer to the charge that ownership of capital instruments is too concentrated lies in the proper use of governmental regulation to reduce the concentration and to continuously broaden the *private* ownership of the means of production.

What Marx *almost* discovered was that both the benefits and the success of capitalism grow with the number of men who are capitalists. His error in failing to discover this truth was the most fateful near-miss in history.

(*Continued from page 210*)

mon law by such comparisons, but generally speaking the Bar at large and the Bench have long since ceased to have any interest in such general comparisons. No one would suggest that law students need to devote much time to comparative law, but there seems to be no justification for an absolute neglect of another great system of law, especially in an international age when we must live with men of all nations and understand their way of thinking, especially in matters of law and of international relations.

The Modern Lawyer . . . *Skill as Well as Theory*

Increasingly is there general recognition that the lawyer, quite as much as the physician and the engineer, must be trained in the skills of the profession as well as in its theory; that it is unethical for the young lawyer to practice at the expense of his client. I do not recall that in my law school course I was ever confronted with a real deed, or a mortgage, or a contract, or a will. I cannot bring myself to believe that such contacts would have injured our cogitations concerning the theory of the law. On the contrary, they would have provoked a host of pertinent questions.

The necessities of our times have called forth at least one highly complicated skills course, that in estate planning,[15] but why stop there? Why should not the skills appropriate to each course be taught by the instructor? Here again the instructor will inevitably look to the expert practitioner for co-operation. Nobody, of course, expects the law schools to turn out expert technicians, but they should at least prepare their students in the elementary skills of the profession just as the other professions do.

But even before we come to skills, I have long thought that the student should have pointed out to him in the subjects he is studying, at least for his own self-study, the leading cases in the state in which he is going to practice. He must, of course, be familiar with them before he can safely practice in his own state. Either the law school must make these citations easily available to him or he must seek them out for himself, as I did at a great loss of time when I could then ill afford it, or he must take an unsatisfactory cram course in preparation for admission to the Bar. A cram course is intellectually unsound because it makes the student only temporarily aware of a large body of law which properly should be a part of his permanent equipment.

I know that some law schools have come to deal only in "general law" on the ground that they are national law schools and that all other law schools seem to be afraid that they will lose caste if they do not imitate them in ignoring local law. I recall that I once asked a professor of evidence what the law was in his state on a particular point. I received a reply that he did not know the law of evidence in his state, that he taught his students the general law of evidence and that a lawyer came up from the city once a year and taught the state law of evidence to his students. This would be humorous if it were not so pathetic in this busy workaday world. I need only remind you that Dean James Barr Ames, the greatest exponent of the case method, literally showered his nine casebooks, which he published over a period of thirty-one years,[16] with lengthy lists of cases from a wide variety of jurisdictions either agreeing or disagreeing with the cases in his casebooks and others have done likewise.[17]

The prospective physician gets much of his training in the hospitals; is there any reason why the prospective lawyer should not do the same thing in the courts? I am wondering what Dr. Flexner would have said of a medical school that ignored the hospitals and taught medicine only by books and lectures. The law student has opportunities in this field that a medical student lacks, for he can compare the diverse methods of the state and federal courts in operation. Lord Chief Justice Mansfield set aside seats in his courtroom for law students; the custom is one which should be revived.

To our ignorance of what is actually going on in the courts may be laid much of the responsibility for the deficiencies in judicial administration throughout the country. How many lawyers know that most of the American states share with Soviet Russia and its satellites the dubious distinction of being the only jurisdictions in the world where judges are elected? How many American lawyers know that of all the nations where the common law prevails it is only in a considerable number of our American states that procedure is prescribed by the legislature rather than by the courts? How many American lawyers realize that it is not normal in the common-law world for a trial judge to be deprived of his power to comment on the evidence, or to ask questions, or to give the charge to the jury in his own language, but to be obliged to charge in language submitted to him by counsel or to charge the jury before counsel sums up to the jury? Such, however, is the law in well over half of our American states. If we are to improve the administration of justice, our lawyers need to know what are sound standards of judicial administration and they will never get such knowledge systematically except in law schools.[18] If the student does not come from one of the five states that require a clerkship for admission to the Bar,[19] how

15. Casner, ESTATE PLANNING. CASES, STATUTES AND OTHER MATERIALS, (2d ed. 1956).

16. SELECT CASES ON TORTS (1874); CASES ON PLEADING AT COMMON LAW WITH REFERENCES AND CITATIONS (1875); CASES ON THE LAW OF BILLS AND NOTES AND OTHER NEGOTIABLE PAPER WITH REFERENCES, CITATIONS AND SUMMARY OF CASES (1881); CASES ON THE LAW OF TRUSTS WITH REFERENCES AND CITATIONS (1881-2), 2d EDITION OF PARTS 1 - 3 (1893); Ames and Smith, CASES ON LAW OF TORTS (1893); CASES ON PARTNERSHIP (1894); CASES ON LAW OF ADMIRALTY WITH NOTES AND CITATIONS (1901); CASES ON LAW OF SURETYSHIP (1901); CASES ON EQUITY JURISDICTION WITH NOTES AND CITATIONS (1901-4).

17. Chafee, Simpson and Maloney, CASES ON EQUITY (3d Ed. 1951); Powell, Richard R., CASES ON FUTURE INTERESTS (1937).

18. Vanderbilt, *Impasses in Justice*, WASH. UNIV. L. Q. (1956), No. 3, 269-308.

19. Del., N. J., R. I., Pa., Vt. See Boyer, PRECEPTORS AND THE LAW PRACTICE CLERKSHIP IN PENNSYLVANIA. Volume 134, THE LEGAL INTELLIGENCER, No. 124, June 29, 1956, 1.

is he to know anything about legal and judicial ethics unless he is taught in the law schools?

So much for some of the major problems in the teaching of the law to undergraduates. Enough has been said, I think, to indicate the need of a thoroughgoing course in legal education. I cannot leave the subject, however, without a word about training for teachers in the law. Too much of their time is devoted to preparing specialists. What we need is more teachers with three dimensional training, with say, a knowledge of Holdsworth's *History of English Law* and its American counterparts for length, Wigmore's writings for breadth and knowledge of human nature, and Pound's writings for depth. I have no objection to a knowledge of a specialty in addition to these things, but certainly not in substitution therefor. Of course, they need to know something about teaching methods; being a sound lawyer does not necessarily make one a good teacher.

The Facts of a Case . . . *As Important as the Law*

Every trial lawyer as well as every trial and appellate judge will agree that the facts of a case are fully as important in practice as the law. It was said of William Murray, the future Lord Chief Justice Mansfield, the greatest judge in English history, that "He excelled in the statement of a case. This, of itself, was worth the argument of any other man."[20] The presentation of the facts in a case in persuasive fashion calls for the highest art of the advocate. Charles Evans Hughes while at the Bar displayed these powers in high degree, and they are also reflected in his major opinions.[21] The advocate must have the story of each of his own witnesses at his command, and he must anticipate, insofar as investigation and reflection will permit, the story of his adversary and all of his witnesses. He must know accurately what each has said and in his own language and be able to compare it with the truth as he sees it. Many a case has been won because a lawyer is able to recall exactly what a witness has said when the statement is challenged by his adversary; he is so accurate that he impresses not only the jury but also the judge.

The law school concededly does not have time to give such training, but it can explain the problem to the student and put on him the burden of developing the power and it can test him to see whether or not he has satisfactorily met the requirements.[22]

Likewise there are many cases that involve the literature of an entire industry and require skill in rapid reading and the marshalling of facts.[23] Here again no time need be taken by the law school instructors or from law school hours. All the instructors need to do is to state the problem, require self-training and follow it by appropriate examinations.

In both kinds of cases to which I have been referring the knowledge is acquired merely to serve the purposes of a pending case and is to be forgotten after the case is over. Otherwise the mind would become a rag bag of miscellaneous useless information.

There is, however, another kind of facts of which our knowledge should be permanent and cumulative as our experience increases. The basic economic, political and social facts of our everyday life as they are actually developing in our rapidly changing civilization are fundamental parts of the lawyer's equipment, if he is to understand the cases he is trying and, still more so, if he is to give advice on what the law is likely to be ten or fifteen years hence. Add to this that most of our students, including even the best, come to law school inadequately or even weirdly prepared in the social sciences. Consider also that most of our law students are so practically minded that they will not accept this type of learning unless it comes to them from the lips of a law school professor as part of their training in law.

With these realities before us we may begin to appreciate the necessity of the law faculty becoming expert in the essentials of the social sciences on which the law is based and even more expert in their presentation. To meet this situation the law faculty must be educated in the social sciences. This will require the aid of economists, political scientists and sociologists but it will be well worth the effort. With such correlation in the classroom of the law and the social sciences, we may look for a new day in the law, best illustrated by the Brandeis-type brief: "Out of the facts", as he never tired of saying, "comes the law".[24] A variety of other plans for bringing the student in touch with the social background of the law have been tried over the years without any real success anywhere that I know of. I

20. Fifoot, LORD MANSFIELD 33 (1936), quoting Butler's REMINISCENCES (1822) 132.

21. Wiener, EFFECTIVE APPELLATE ADVOCACY, (1950): The statement of facts and issues in the opinions of Supreme Court Justices are the best examples of effective brief writing. They possess, as they must, effective argumentative style. Wiener feels Mr. Chief Justice Hughes possessed this style to its finest degree. ". . . the most effective argumentative style is one like that of the late Chief Justice Hughes . . . ." "There is something powerful and inexorable about a Hughes opinion . . . ." "Read those opinions, get the feel of the pulsating, rhythmical, irresistible argument rolling on toward its predetermined end, and you will appreciate the force of really argumentative writing." *Id.* at 68.

22. I am unable to find any evidence that this kind of program is being pursued at any law school at the present time.

23. In speaking to the students at Columbia Law School, former Judge Simon H. Rifkind said: "I am a great advocate of having young lawyers learn the art of mastering facts. Take one term of court—one that began in October, 1950. These are the facts of a series of industries that had to be mastered: 1. The electric welding of plastic material. 2. The history and racket of internal dissension of a large labor union. 3. The art of transmitting colored images by way of television. 4. The method of distribution of radio and television products in the New York area market. 5. The details of the trade of catching, canning and distributing of Maine sardines. 6. The art of manufacturing of canned products and methods of distribution and advertising. 7. All of the economic facts underlying a country like Israel in order to prepare a registration statement for a bond issue." 6 COLUM. L. SCH. NEWS 2, October 12, 1951.

24. See Rooney, *Law as an Instrument of Social Policy—The Brandeis Theory*, 22 ST. JOHN'S L. REV. 1, 7 (1947): "The persuasiveness of his utilization of facts as argumentation was so effective that, in less than ten years from the time he introduced the now famous 'Brandeis Brief', he could tell the Chicago Bar Association in a not less famous address 'The Living Law' that 'The court reawakened to the truth of the old maxim of the civilians *ex facto jus oritur*. It realized that no law, written or unwritten, can be understood without full knowledge of the facts out of which it arises and to which it is to be applied.' " *Id.* at 8. "Indeed it may be said, that facts are for Justice Brandeis the sources of the law." *Id.* at 34.

submit this plan is worthy of a thoroughgoing test. Again, but a very small amount of precious undergraduate law school time will be required.

One other course in facts, however, does require law school time and for that do I plead most earnestly. What will it profit a student to know as much about the law of torts as Dean Prosser or Professor Seavey, or as much about the law of workmen's compensation as Dean Larson, now Under Secretary Larson, or as much about pleading and practice as Chief Judge Clark, or as much about evidence as Dean Wigmore, if he knows nothing about the human body and forensic medicine which are involved in 90 per cent of our civil and criminal litigation? A knowledge of forensic medicine is as much a major premise in these fields as is a knowledge of the law itself. The minor premise of the facts of the individual case may be quickly forgotten, once the particular case is over, but these major premises, both of law and of fact, he must know and continue to know more and more about as his work goes on. Such a course should be given by an expert or experts immediately after the completion of the courses in torts and crime, otherwise those courses will be largely unintelligible in fact and lost to practical use for the remainder of the law school course in moot court work, and lost for life to the student unless he undertakes to school himself, which relatively very few take occasion to do. Such a class in forensic medicine, moreover, is itself marvelous training in the marshalling and mastering of facts.[25]

Only one basic objection has or can be raised against the program urged here—lack of time. After thirty-four years of law teaching and forty-three years in the courts, I am definitely prepared to say that there is no merit to such a contention. Certainly we should not listen to it until a wholehearted attempt has been made to look at education in the law as a whole, to correlate our efforts at the school, college and law school levels, (something we have been inexplicably slow to do) and to turn our back on outworn fetishes. We need to become time conscious:

> Behind my back I always hear
> Time's winged chariot hurrying near.

We can begin by helping the colleges prepare their students for law school in the broadest possible manner and at the same time give them a better education in three years than most of them are getting for the law in four. Then by using half of the present summer vacation (I would never dream of going back to the war-time accelerated program) we can do more for them in two and a half years than most institutions are now doing in three. Surely in these days when precious years are being taken away necessarily from our youth by military service, we cannot serve our students better than by systematically planning to shorten their period of preparation for the Bar by one and a half years, especially if by doing so we can give them a much better course than we had in our day.

Such a program as I have been outlining will, I know, jar many a vested interest, but higher education has survived far greater jars in other fields. It is high time, I submit, that we began to do for the law what some of the other professions have been doing for their students—face the realities of life.

25. Halpern, *Medico-Legal Problems*, 17 U. Pitt. L. Rev. 57 (1955).
Small, *Personal Injury Law: Law Schools Need To Give a Shot of Medicine*, 41 A.B.A.J. 693 (August, 1955), where the author states that "seven out of every ten personal injury cases turn on medical considerations rather than legal."

Lawyers in the United States and Russia

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> abundant opportunities, other opportunities to employ their intelligence and general training. Few of them are so fond of their present work that they will regret changing it for another job which, in any case, will give the majority of lawyers a better living.

And here is another quotation from a book called, *Toward Soviet America*, which was also available on bookstands not too many years ago:

> The pest of lawyers will be abolished, the courts will be class courts definitely warring against the class armies of the toilers. They will make no hypocrisy like capitalists' courts exploiting the masses.

Make no mistake about it, what the Communists said in their propaganda is just what they have done to the lawyers in their own country. The word "lawyers" is in use both in Russia and in this country. The word is the same, but the meaning is different.

What has happened to the legal profession in Russia is an important lesson for us and for the world. Because the fundamental integrity of our courts and our legal profession have never been seriously questioned, there is a tendency in this country to take them for granted, to fail to comprehend their indispensable role in the lives of our people. The integrity of the legal profession means more to the ordinary man than the integrity of any other profession, for the simple reason that if it ever ceased to be the protector of life, liberty and property, all of the blessings we enjoy because of that protection would have no meaning. As a wise midwestern churchman said only recently, lawyers have within themselves, motivating their procedures and guiding their judgments, the legal conscience of the western world. May it always be said that the lawyers of America are alert to the great responsibility that rests upon them; may it never be said they allowed the integrity of the profession to be compromised to carelessness or to expediency in any form.

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ble, and he should not endeavor to get the same before the jury in any manner. Neither should he include in an argument, addressed to the court, remarks or statements intended improperly to influence the jury or the public.

(e) A lawyer should not propose a stipulation in the jury's presence unless he knows or has reason to believe the opposing lawyer will accept it.

(f) A lawyer should never employ dilatory tactics of any kind to procure more fees.

(g) A lawyer should never file a pleading or any other document he knows to be false in whole or in part or which is intended only for delay.

19. Adverse Authorities.

A lawyer should not attempt to mislead the court by citations of authorities he knows have been overruled or distinguished.

20. Publications re Pending Litigation.

A lawyer should not publish, cause to be published, or aid or abet in any way, directly or indirectly, the publication in any newspaper or other documentary medium, or by radio, television or other device, of any material concerning a case on trial or any pending or anticipated litigation calculated or which might reasonably be expected to interfere in any manner or to any degree with a fair trial in the courts or otherwise prejudice the due administration of justice. If extreme circumstances of a particular case require a statement to the public, it should not be made anonymously and no reference to the facts should go beyond quotation from the records and papers on file in court or other official documents, and no statement should be made which indicates intended proof or what witnesses will be called, or which amounts to comment or argument on the merits of the case.

21. Discovery of Imposition or Deception.

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court, a party, or other counsel, he should promptly endeavor to rectify it.

22. Applicability.

This Code of Trial Conduct applies to all lawyers, whether engaged in private practice or public employment.

CPA's Certificate

(Continued from page 230)

ticle "Accounting in a Nutshell" in the June, 1953, issue of this Journal. The reference in the certificate to "generally accepted accounting principles" brings into operation all such principles, with special emphasis on *Accounting Research Bulletin No. 43*, restating and revising all earlier bulletins (Nos. 1 through 42). Those bulletins deal only with selected segments of the area of accounting principles and practices; but, once again, they serve to circumscribe both duty and responsibility.

"*. . . applied on a basis consistent with that of the preceding year.*" This closing phrase of the certificate underscores the truth that, in a given instance, there may be an available choice of competing accounting principles, both or all of which are "generally accepted", and that there may be a choice of method of applying principles. Whatever the choice, the principles must be applied on a basis consistent with the basis used in the preceding year; to do otherwise might result in distorting the results of the year under review. Change is permitted, but if change is made, it must be disclosed, and it may require that the certificate be suitably qualified.

Meaningful Deviations . . . *The Qualified Certificate*

In the foregoing, we have dealt with the standard certificate which is the typical unqualified certificate. Each word is weighted with significance. Any variation from the standard wording should be noted with care; the deviation may be meaningful. The CPA has the duty to report any reservations or exceptions with clarity and without equivocation. He has the duty so to word his report that the reader will not be induced to rely upon it beyond what is intended. Reservations or exceptions may arise from any one or more of a multitude of varied circumstances; whatever the cause, it should be stated clearly; it may be a departure from generally accepted accounting principles; it may be a change from one acceptable principle to a different acceptable principle; it may be a change in the application of an accepted principle; it may be an omission or a commission or an important difference in judgment between management and auditor. The "opinion" paragraph of the certificate may then be modified to read: "In our opinion, except that (stating the ground of exception) . . ."

Disclaimer of Opinion: When the reservations or exceptions are so extensive or so material as to negative an opinion on the financial statements as a whole, the CPA is precluded from issuing either an unqualified or a qualified certificate. In other cases, the client may, for reasons of economy or otherwise, impose such restrictions on the scope of the audit as to make it impossible for the CPA to meet the requirements of accepted auditing procedures. Whatever the reason, it is not enough that the CPA withhold his opinion; it is not enough that he write a report "without opinion". He has the affirmative duty to disclaim an opinion and to state the reason. That may be done in some such manner as this: "In view of the limited scope of our audit, we are unable to express an opinion on the financial statements as a whole. However, the

statements are strictly in accordance with the books of account and with the United States income tax returns, and we have no reason to believe that the statements do not fairly present the financial condition." In other instances, where the statements are prepared by the CPA from the books without audit, they should so recite.

A New Change in the Certificate: In April, 1956, the Institute Committee on Auditing Procedure issued its Statement on Auditing Procedure No. 26. It seeks to place new emphasis on the requirement of the "extended procedures" that the CPA should supervise the physical inventory taking and should independently confirm the receivables. If the CPA intends to express an unqualified opinion, the committee now states its view that he "should not only disclose . . . the omission of the procedures, regardless of whether or not they are practicable and reasonable, but also should state that he has satisfied himself by means of other auditing procedures . . ."—and should incorporate that statement in the certificate.

In 1929, the Institute could undertake to state its basic requirements in a simple pamphlet of some twenty-six pages. Since those "dear, dead days of long ago", the accounting profession has taken giant strides, as we have now seen. It is not to be expected that the lawyer will bear in mind all the ramifications that we have discussed. But it is well that he be alerted to their existence, that he be alerted to the need for inquiry, and that he seek accounting counsel when in doubt. At the least, he should have an understanding of the difference between CPA certificates, and should be able to detect the absence of a certificate when certificate there is none.

The Right To Work Revisited

(Continued from page 234)

fore occupies a "priority" or "preferred place" in our constitutional hierarchy of values.[29]

The phrase "clear and present danger" should "not be distorted by being taken from its context" as if it were "a technical legal doctrine" or "a formula for adjudicating cases".[30] Neither should the phrase "preferred position" be used uncritically so as to "subtly imply" that any law touching upon civil liberties however remotely is "infected with presumptive invalidity".[31]

The authors of the "Holmes-Brandeis rationale",[32] laid down initially by these two great champions of civil liberty in 1919-1920 and since accepted in subsequent opinions as the modern "clear and present danger" test,[33] are both quoted on the question of compulsory unionism by the opinion writers in the *Hanson* case.

Justice Douglas recalls that "Mr. Justice Brandeis who had wide experience in labor-management relations prior to his appointment to the Court, wrote forcefully against the closed shop", but recognized that organized labor "cannot accept the open shop as an alternative" because "it means the destruction of the union". In a letter to Lincoln Steffens, Brandeis wrote that "The advance of unionism demands therefore some relation between the employer and the employee other than either the closed or open shop, and I feel confident that we have found a solution in the preferential union shop." Justice Frankfurter adopts the dissent in *Adair* v. *United States*[34] where Justice Holmes stated that even a statute calculated to "bring about the complete unionizing of such railroad workers as Congress can deal with" would not be held invalid for lack of sufficient justification.

Dean McClain insists that changed circumstances might have altered the views of Justice Holmes and that he possibly was referring to complete union organization rather than to compulsory union membership in the *Adair* dissent. It is certainly clear that Holmes held the opinion that he "could not pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interest, not only of the men but of the railroads and the country at large". Under his conception of judicial review, the Constitution could not be invoked to strike down legislative action where the object sought "might be deemed by Congress an important point of policy" if it is "impossible to say that Congress might not reasonably think that the provision in question would help a good deal to carry its policy along".

Both Holmes and Brandeis explicitly recognized that the primary responsibility for adjusting or choosing between competing political, economic and social interests in our society of necessity belongs to the legislative branch of government, and that such policy judgments are entitled to great respect by the judicial branch. Justice Holmes clearly stated in the *Adair* dissent that—

> Where there is, or generally is believed to be an important ground of

29. In presenting this argument, Dean McClain quotes several statements from the leading labor case of *Thomas* v. *Collins*, 323 U.S. 516 (1945), which applied the "clear and present danger" test to invalidate a Texas statute requiring registration of union organizers before solicitation of union membership could be attempted, holding that the law in question was an unconstitutional abridgment of the rights of free speech and assembly. As previously noted by this writer, (*op cit. supra* note 3), that case recognized that the balancing of conflicting rights and interests "is in the first instance a judgment of policy for the legislative body" subject to judicial review by the Supreme Court "in the light of our constitutional tradition".

30. Frankfurter, J., concurring in *Pennekamp* v. *Florida*, 323 U.S. 516, 529-530 (1945).

31. Frankfurter, J. in *Kovacs* v. *Cooper*, 336 U.S. 77, 90 (1949), where he proceeds to "trace the history of the phrase 'preferred position' ", for the sake of "clarity and candor in these matters, so as to avoid gliding unwittingly into error".

32. See the opinions of Vinson, C. J., and Frankfurter, J., concurring, in *Dennis* v. *United States*, 341 U.S. 494 (1951), which trace the history of the doctrine beginning with the opinions of Justices Holmes and Brandeis in *Abrams* v. *United States*, 250 U.S. 616 (1919), *Gitlow* v. *New York*, 268 U.S. 652 (1925), and *Whitney* v. *California*, 274 U.S. 357 (1927).

33. Major labor cases applying the doctrine include *Thornhill* v. *Alabama*, 310 U.S. 88 (1940); *Carlson* v. *California*, 310 U.S. 106 (1940); *Bridges* v. *California*, 314 U.S. 252 (1941); *Thomas* v. *Collins*, *supra* note 29; and *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490 (1949).

34. 208 U.S. 161 (1908), overruled in substance in *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 187 (1941).

public policy for restraint the Constitution does not forbid it, whether the court agrees or disagrees with the policy pursued.

In *Duplex Printing Press Co.* v. *Deering*,[35] Justice Brandeis adhered to the belief that, although developing conditions in the economic clash of competing interests of those engaged in industry may give rise to "danger to the community", under our constitutional scheme—

> . . . it is not for judges to determine whether such conditions exist nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature . . .

After thoroughly reviewing in his typical scholarly fashion practically all of the preceding decisions in which the "clear and present danger" test of Holmes and Brandeis had been discussed or applied by their successors, Justice Frankfurter stressed in the 1951 case of the eleven Communist Party leaders[36] that "The distinction which the Founders drew between the Court's duty to pass on the power of Congress and its complementary duty not to enter directly the domain of policy is fundamental" so that the judiciary is absolutely required to "abstain from confounding policy with constitutionality" by "not declaring unconstitutional what in a judge's private judgment is unwise and even dangerous".

Dean McClain cites various cases upholding the right of workers to join together in labor unions and bargan collectively with their employers as an exercise of that "freedom of association" flowing from the constitutional rights of free speech and assembly. Despite his reference to isolated expressions by a few state courts, such as Maine and Wyoming, implying that the "right not to join" a union is the constitutional equivalent of the "right to join", there is nothing in our legal tradition as reflected by the decisions of the Supreme Court of the United States to justify the theory that "freedom of association has both positive and negative aspects". (Similar verbal parallelism was unsuccessfully invoked by those who urged that the positive right to speak which is part of the "freedom of expression" protected by the First Amendment gives rise to a corollary negative right to remain silent.[37])

There can be no infringement or impairment of First Amendment rights by a collective bargaining agreement because it requires financial support of the bargaining agency by all who receive the benefits of its work. Dean McClain rather strenuously objects to the analogy drawn by the Supreme Court to "the case of a lawyer who by state law is required to be a member of an integrated Bar", on the ground that an integrated Bar is "a governmental organization of a regulatory character" and a labor union is "a private association" engaging in numerous activities other than its collective bargaining function. Such criticism obscures the similarity which may be found in the requirement imposed upon lawyers compelled to belong to such an integrated Bar of paying fees and periodic dues to help defray the costs of bar activities which are not tax-supported. Could it reasonably be said that this writer, for example, is being deprived of his civil liberties when he pays his annual dues to the State Bar of California if it conducts or sponsors publishing activities, insurance plans, legislative programs, educational functions and social affairs in addition to performing its regulatory functions? Is an attorney compelled to join such an integrated Bar entitled to a more precise allocation of state Bar overhead, so that his compulsory annual dues payments may be reduced to the actual cost of carrying on the quasi-governmental bar activities? Obviously not.

It is said that the construction of the "union shop" statute by the *Hanson* decision to establish money payments as the only permissible condition of union membership is "demonstrably erroneous" because the amendment merely limits the right to discharge a man from employment by reason of lack of membership. When the right to compel discharge for non-membership is not present, there is no compulsory union membership. In the case of *United States* v. *C.I.O.*,[38] cited by Dean McClain, the Supreme Court reiterated the well-known rule of statutory construction which requires the Court to adopt that reasonable statutory interpretation which avoids potential conflict with the Bill of Rights when a measure is susceptible of several possible meanings.

The "union shop" provisions of the Taft-Hartley Act had been previously construed "to prevent the utilization of union security agreements except to compel payment of dues and initiation fees" thereby protecting the union majority against "free riders".[39] The Supreme Court's similar interpretation of the 1951 Railway Labor Act amendment is amply supported by the legislative history. It discloses that Congress only intended to permit union contracts under which "those who enjoy the fruits and benefits of the

35. 254 U.S. 443, 488 (1921).
36. *Supra* note 32.
37. *Lawson* v. *United States*, (App. D.C., 1949), 176 F. 2d 49, *cert. den.* 339 U.S. 934 (1950).
38. 335 U.S. 106 (1948).
39. *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 41 (1954) and *Union Starch & Refining Co.* v. *N.L.R.B.*, (7th Cir., 1951) 186 F. 2d 1008, 1012.

unions should make a fair contribution to the support of the unions" by paying their "share of the cost of obtaining such benefits".[40] The exaction of union dues, initiation fees or assessments to force ideological conformity or impose other violations of genuine civil liberties is neither authorized by the "union shop" amendments nor permitted by the decisions of the Supreme Court supporting their application.

Name Calling . . . *Little Enlightenment*

It adds little enlightenment to this controversial subject to employ the name-calling tactics of the propagandist or demagogue because one may disapprove or disagree with a particular legislative act or judicial decision. Broadly asserting that congressional acquiescence in certain limited forms of union security "cannot give them any legal sanction", George Rose wrote in 1949 that the "extra-constitutional" and "pseudo-political status" thereby allegedly conferred upon labor organizations was comparable to *"the totalitarian state"* and comprised "the first step" toward "the undermining of our democracy" through "regimentation, domination and interference with the individual's activities". Now, in 1956, Dean McClain cries out that our nation's highest court has provided "an entering wedge for the theory of the American Federation of Labor" which will constitute "a long step toward establishment of a one-party *totalitarian state*" if ultimately given "unequivocal constitutional sanction". The Dean accuses the Supreme Court of having already sanctioned "union shop" practices which are "antithetical to our established institutions" and violate "the fundamental liberties of man enshrined in our Bill of Rights". To clinch this impassioned plea, Dean McClain goes Mr. Rose one better and quotes from the Declaration of Human Rights of the United Nations to demonstrate the universal acceptance of the "right to work".

Ironically enough, the only major world power which explicitly mentions this so-called "right to work" in its written constitution is the *Soviet Union*—leading exponent of *totalitarianism* on the contemporary world scene.[41]

Individual workers in the Soviet Union may have the benefit of such a high-sounding constitutional declaration of their "right to work", but they do not enjoy any of the actual benefits of our democratic system of industrial jurisprudence which Americans have achieved through collective bargaining between free labor unions and free management. Soviet workers do not have the assurance of a union contract providing that they will be selected for the available job of their choice if they possess the requisite seniority and competence. Soviet workers, unlike American union members, are not adequately protected by contract against arbitrary removal from the job without just cause, but, to the contrary, are subject to demotions and discipline for disobeying management's arbitary rules and regulations governing conditions of employment. Soviet workers frequently are subjected to wage cuts, layoffs and transfers without previous notice depending on the whims and political machinations of management officials which forms of discrimination either do not take place in American "unionized" plants or, in the rare instances where they do occur, are promptly redressed through a voluntary grievance and arbitration procedure.

"Freedom of association" for mutual advancement and protection under our American system of free enterprise does not entitle nonmembers to the benefits derived from private organizations of capital and labor without contributing anything by way of financial support in return. It merely affords nonmembers the opportunity to join the organization upon the same terms and conditions as any other member.[42]

The political contests between the advocates and the critics of union security will undoubtedly continue in the legislative halls and polling places of this democratic nation, which is appropriate, but the underlying constitutional issues have been resolved.

Since the Constitution of the United States is "not intended to embody a particular economic theory" and is "made for people of fundamentally differing views"—unlike the Constitution of the Soviet Union—all Americans on both sides of such important issues would do well to be guided by the sage advice of Justice Holmes, that great dissenter, who expressed the present-day majority viewpoint when he wrote that—

> . . . the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution. . . .[43]

40. Remarks of Senator Hill, 96 Cong. Rec. 16279 (1951); House Report No. 2811, 81st Cong., 2d Sess. (1951), page 4.

41. Article 118 of the Soviet Constitution declares that "Citizens of the U.S.S.R. have the Right To Work . . ." and "The Right To Work is secured by the socialist organization of the national economy, by the irresistible growth of the productive forces of the Soviet society, and by the liquidation of unemployment."

42. *Associated Press* v. *United States*, 326 U.S. 1 (1945).

43. *Supra* note 21.

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Nominating Petitions

(Contined from page 274)

South Carolina

■ The undersigned hereby nominate Walton J. McLeod, Jr., of Walterboro, for the office of State Delegate for and from South Carolina, to be elected in 1957 for a three-year term beginning at the adjournment of the 1957 Annual Meeting:

R. M. Jefferies, Jr., and Herman I. Mazursky, of Barnwell;

Frank H. Bailey, Coming B. Gibbs, William S. Hope, J. W. Cabaniss and Clarence E. Singletary, of Charleston;

R. A. Palmer and W. Louis O'Farrell, of Florence;

Wesley M. Walker, J. D. Todd, Jr., James H. Watson and Frank G. Carpenter, of Greenville;

N. H. Hamilton, of St. George;

Edwin W. Johnson, John H. Nolen, R. E. Browne, III, and T. Sam Means, Jr., of Spartanburg;

John S. Wilson, Shepard K. Nash, M. M. Weinberg and George D. Shore, Jr., of Sumter;

Heber R. Padgett, Thomas M. Howell, Jr., and H. Wayne Unger, of Walterboro.

South Dakota

■ The undersigned hereby nominate Roy E. Willy, of Sioux Falls, for the office of State Delegate for and from South Dakota to be elected in 1957 for a three-year term beginning at the adjournment of the 1957 Annual Meeting:

R. F. Williamson, Stanley R. Voas, F. W. Noll, R. M. Schutz and Vernon Williams, of Aberdeen;

G. F. Johnson, of Gregory;

Merrell Quentin Sharpe, John W. Larson and H. L. Hollmann, of Kennebec;

John B. Jones, of Presho;

Kelton S. Lynn, H. F. Fellows, Charles H. Whiting, E. W. Christol and W. A. McCullen, of Rapid City;

Gene E. Pruitt, Francis M. Smith, John P. McQuillen, B. O. Stordahl and Gale B. Braithwaite, of Sioux Falls;

Alan L. Austin, Irving A. Hinderaker, Ross H. Oviatt and O. E. Beardsley, of Watertown;

Clarence E. Talbott, of Winner.

Texas

■ The undersigned hereby nominate James L. Shepherd, Jr., of Houston, for the office of State Delegate for and from Texas to be elected in 1957 for a three-year term beginning at the adjournment of the 1957 Annual Meeting:

W. W. Gibson and A. J. Folley, of Amarillo;

Cecil E. Burney, Allen Wood, C. Burtt Potter, Leslie S. Lockett and Cecil D. Redford, of Corpus Christi;

Dwight L. Simmons, R. G. Storey, J. Cleo Thompson, J. Glenn Turner, Paul Carrington and A. W. Walker, Jr., of Dallas;

J. A. Gooch, S. A. Crowley, G. W. Parker, Jr., Jack C. Wessler and Atwood McDonald, of Fort Worth;

Leon Jaworski, Cecil N. Cook, Harry R. Jones, Albert P. Jones, David T. Searls and Denman Moody, of Houston;

William Jarrel Smith, of Pampa.

Wyoming

■ The undersigned hereby nominate Edward E. Murane, of Casper, for the office of State Delegate for and from Wyoming to be elected in 1957 for a three-year term beginning at the adjournment of the 1957 Annual Meeting:

R. R. Bostwick, Howell C. McDaniel, Jr., Robert B. Laughlin, Harry A. Thompson, Ernest Wilkerson, Harvey J. Landers, Houston G. Williams, Donald E. Chapin and Warren H. Winter, of Casper;

J. J. Hickey and Clarence A. Swainson, of Cheyenne;

J. D. Fitzstephens, Oliver W. Steadman, Sarah Donley Steadman and Henry T. Jones, of Cody;

T. C. Daniels and Joseph Garst, of Douglas;

Sam Corson and Vincent Vehar, of Evanston;

Frank E. Hays and W. Randall Boyer, of Lander;

Rodney M. Guthrie, of Newcastle;

Jack Lewis, of Powell;

Eph U. Johnson, of Rawlins;

R. Lauren Moran, of Riverton.

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